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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1929~~ 1930

No. ~~669~~ 49

BAIN PEANUT COMPANY OF TEXAS AND UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLANTS,

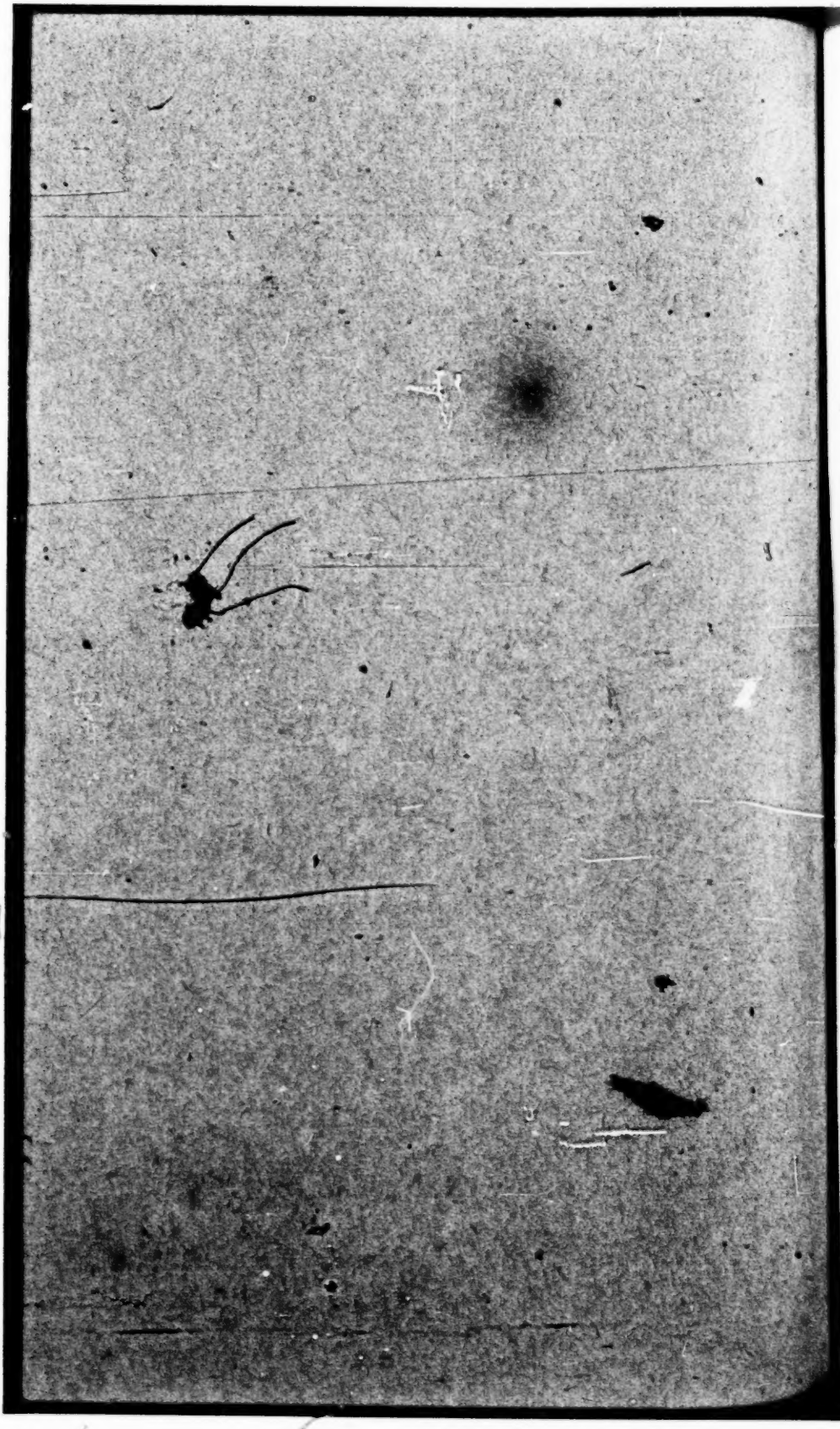
vs.

DAVE PINSON AND G. B. GUYGER

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT, STATE OF TEXAS

FILED FEBRUARY 15, 1930

(34,800)



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IN THE DISTRICT COURT OF COMANCHE COUNTY

[fols. a-2] No. 7043

PINSON & GUYGER

vs.

BAIN PEANUT COMPANY OF TEXAS

ORIGINAL PETITION—Filed June 5, 1924

To the Said Honorable Court:

Now come Dave Pinson and C. B. Guyger, composing the partnership of Pinson & Guyger, hereinafter styled plaintiffs, who reside in Comanche County, Texas, complaining of the Bain Peanut Company of Texas, a private corporation duly incorporated and doing business under the laws of the State of Texas, with its principal office and place of business at Fort Worth in Tarrant County, Texas, and that A. C. Barlow is Secretary, Treasurer and Manager of said Company and resides at Fort Worth, in Tarrant County, Texas, on whom service may be had in this case, which said Bain Peanut Company of Texas is hereinafter styled defendant, and for cause of action plaintiffs respectfully represent to the court:

1

That heretofore, to-wit, on or about the 1st day of November, 1923, the defendant, acting through and by its duly authorized accredited and acting agent, Bill Huxford, came to plaintiffs at Proctor, Comanche County, Texas, and entered into a contract with plaintiffs, by which it was agreed between the plaintiffs and defendant that the plaintiffs, who were dealers in and purchasers of peanuts, would buy peanuts for the defendant on the open market during the peanut season of 1923 and 1924, which was then [fols. 3-5] just beginning and that plaintiff would buy peanuts for no other parties. It was agreed that plaintiffs would pay their own money for the peanuts, which were to be purchased at the best price obtainable on the current

market from day to day and would store the said peanuts in a storehouse at Proctor, Texas, agreed on at the time between plaintiffs and defendant. That the said peanuts would be stored in such a manner as to cure and dry properly for shipment to the defendant's central plant or mill at Ft. Worth, Tarrant County, Texas, where it was agreed that the peanuts would be shipped as soon as properly cured. That the plaintiffs would pay for the storage and insurance on the peanuts while in storage, and drayage to the cars when they should be ready to ship to the defendant, as aforesaid. It was agreed that defendant would reimburse the plaintiffs for the original cost of the peanuts and for their insurance, storage and drayage and pay the plaintiffs for their services, a commission of Ten cents on every bushel which they should buy for the defendant.

[Paragraphs 2, 3, 4 and 5 allege performance by plaintiff and breach by defendant.]

[fol. 6] 6

Plaintiffs allege that the failure and refusal by the defendant to perform its said contract, duly and properly made and entered into in good faith by their agent, occasioned these plaintiffs an actual loss and damage on account of the fall in the price of peanuts of Five Thousand Eighty One Dollars and Fifty Eight cents ($5,081.58) and on account of money paid out for drayage Forty Six Dollars and Ten cents, ($46.10), insurance One Hundred and Seventy Eight Dollars and Eighty Nine cents ($178.89), agreed commission Six Hundred and Ninety Eight Dollars and Ten cents ($698.10), or a total of Six Thousand and Four dollars and Sixty Seven cents ($6,004.67) all of which loss and damage was directly and proximately caused these plaintiffs by the defendant's failure and refusal to perform its said contract, which said contract was made and was to be performed wholly in Comanche County, Texas.

Wherefore plaintiffs pray the court that defendant be cited in terms of law to appear and answer herein, and that on final hearing hereof they have their damage above

alleged with interest thereon from the date of said contract, and for cost of suit and for such other and further relief as in law and in equity, they may show themselves entitled to.

Callaway & Callaway, Attorneys for Plaintiffs, Pinson & Guyger.

[File endorsement omitted.]

[fol. 7] IN THE DISTRICT COURT OF COMANCHE COUNTY

ORIGINAL ANSWER—Filed July 8, 1924

Now comes the Bain Peanut Company of Texas, defendant herein, and, subject to its Plea of Privilege herein filed, and without waiving same, respectfully pleads as follows:

1

Defendant demurs generally to the allegations in plaintiff's Petition contained and says that same state no cause of action against it, and of this it prays judgment of the court.

[Paragraphs 2 and 3 are special exceptions and 4 a general denial.]

[fol. 8] Bryan, Stone, Wade & Agerton, Attorneys for Defendant, Bain Peanut Company of Texas.

[File endorsement omitted.]

[fol. 9] IN DISTRICT COURT OF COMANCHE COUNTY

CONTROVERTING AFFIDAVIT TO DEFENDANT'S PLEA OF PRIVILEGE—Filed July 15, 1924

To the said Honorable Court:

Now comes Dave Pinson and C. B. Guyger, and file this, their controverting plea to the Defendant's Plea of Privilege heretofore filed in this case on July 8th, 1924,

and for such controverting plea and affidavit, respectfully represents to the court.

1

That the venue of this suit is properly laid in Comanche County, Texas, under the provisions of Article 1830, subdivision 24 of the Revised Civil Statutes of the State of Texas, as shown by said subdivision and as shown by the allegations of the plaintiff's Petition.

That about the 1st of November, A. D., 1923, the defendant, acting through its duly authorized agent came to Proctor, Texas and made a contract with these plaintiffs wherein it was agreed that the plaintiff would go into the open market at the town of Proctor in Comanche County, Texas, and buy peanuts at the prevailing prices at the time they were offered on the streets and would pay their own money for said peanuts. That the plaintiffs would store said peanuts in the storehouse at Proctor agreed on between the plaintiffs and defendant and they would be kept there until cured and ready for shipment to Fort [fol. 10] Worth, Texas, to the defendant's peanut mills, that the plaintiffs would pay the storage and insurance on the peanuts and the drayage to the cars at the time of shipment, and it was agreed that such peanuts when ready to ship would be placed on board the cars consigned to defendant's mill at Fort Worth, Texas, the defendant would pay the plaintiffs their actual outlay for the peanuts and an additional compensation of 10 per cent per bushel for their services. That defendant breached said contract and refused to take the peanuts so bought by the plaintiffs, which peanuts amounted 6981 bushels and paid therefor an aggregate of $12,455.78; that at the agreed time of shipment the defendant notified plaintiffs at Proctor, Texas, that they would not comply with the said contract and have at all times refused to comply with the said contract and the plaintiffs were forced to sell the said peanuts on or about the — day of ——, 1924, at a loss to them of $6,004.67.

That the defendant is a private corporation and this cause of action arose in Comanche County, Texas, and the venue of this suit is properly laid in Comanche County, Texas, on account of such facts.

Wherefore the plaintiffs pray the court that he set a day for hearing of this plea of privilege and plaintiffs' controverting affidavit as of July 30th, 1924, and that defendant's attorneys be served with a copy of this affida-
[fol. 11] vit, in accordance with law.

Dave Pinson, C. B. Guyger.

[fol. 12] In District Court of Comanche County

[Title omitted]

Amended Plea of Privilege and Demurrer to Plaintiffs' Controverting Affidavit—Filed July 30, 1924

To the Honorable J. R. McClellan, Judge of said Court:

Now comes Bain Peanut Company, defendant in the above entitled and numbered cause, and files and urges this, its First Amended Plea of Privilege in lieu of its original Plea of Privilege heretofore filed in due order on the 8th day of July, A. D., 1924, and represents:

1

Defendant excepts and demurs generally to the controverting plea or affidavit herein filed on the 15th day of July, A. D., 1924, by the plaintiffs and says that such controverting plea or affidavit is wholly insufficient under the law to raise any issue of venue and jurisdiction in this court as against defendant's Plea of Privilege; wherefore defendant prays judgment of the court upon this, its demurrer, and that its plea of privilege be sustained and the case ordered transferred to the District Court of Tarrant County, Texas, without further proceedings.

Bryan, Stone, Wade & Agerton, Attorneys for Defendant.

2

That this defendant was not, at the date this suit was filed, nor at the time of service herein on it, nor was it at the date its original plea of privilege was filed, and is not
[fol. 13] now, at the filing of this, its amended plea of privi-

lege, a resident of or domiciled in Comanche County, Texas, the county where this suit was filed and is pending.

That this defendant does not now have or maintain and never has at any time prior hereto had or maintained an office, agency or local agent in Comanche County, Texas; and that this defendant now is and at all times hereto has been a resident of and domiciled in Tarrant County, Texas, and not elsewhere.

That none of the exceptions to exclusive venue to be sued in the county of one's residence mentioned in Art. 1830, or in Art. 2308 of the Revised Statutes of the State of Texas exist in this cause against this defendant.

Wherefore defendant urges this plea of privilege, and prays that no further action be had in the District Court of Comanche County, Texas, other than to transfer this cause to the District Court of Tarrant County, Texas, at Fort Worth, Texas.

Bain Peanut Company of Texas, by A. C. Barlow, Secretary-Manager. Bryan, Stone, Wade & Agerton, Attorneys for Defendant.

Duly sworn to by A. C. Barlow. Jurat omitted in printing.

[fol. 14] [File endorsement omitted.]

[fol. 15] In District Court of Comanche County

[Title omitted]

Decree

On this the 8th day of November, A. D., 1927, at a regular term of this court, came on to be heard the above entitled and numbered cause, it having been regularly reached on the docket of this court, and called for trial, and the plaintiffs appeared in person and by attorney and announced ready for trial, and the defendants appeared and presented their several demurrers and exceptions, which were over-

ruled, to which action due exception was taken, and the defendants thereupon announced ready for trial.

And thereupon came a jury which had theretofore been demanded, said jury consisting of twelve good and lawful men to-wit, A. G. Miller and eleven others, who, after having been duly selected, empannelled and sworn to try the case, and who after having heard the pleadings read, the evidence in the case, and the charge of the court submitting special issues, and the argument of counsel, retired to consider of their verdict; and thereafter on the 9th day of November, A. D., 1927, returned into open court their verdict upon the special issues submitted to them by the court, which issues and findings are as hereinafter set out; and thereafter on this the 15th day of December, 1927, came on to be heard plaintiff's motion for judgment and the same being considered by the court, the court renders judgment [fols. 16-18] on said motion the uncontradicted evidence and the special issues and answers thereto as follows: [fol. 19] And it appearing to the court from the pleadings in the case the evidence and the findings of the jury in answer to the issues submitted, that the plaintiffs are entitled to a judgment against the defendant for the sum of Six Thousand Eight Hundred Five and 40/100 Dollars, ($6805.40) for the breach of said contract, and it further appearing from the pleadings and the evidence and the uncontradicted facts of the case that the said amount, ($6805.40) is the total of the loss or damage sustained by the plaintiffs on account of the decline in the price of the peanuts alleged to have been bought, and the commission alleged to have been contracted to be paid to the plaintiffs and the other expenses alleged to have been incurred by the plaintiffs, according to the contract, and together with interest on said amount from the date of the alleged breach [fol. 20] of contract, all of which items were plead and proved and found by the jury as items of damage on account of the breach of the contract found to have been made.

It is therefore ordered, adjudged and decreed by the court that the plaintiffs Dave Pinson and C. B. Guyger, composing the firm of Pinson & Guyger, do have and recover of and from the defendant The Bain Peanut Com-

pany of Texas, a private corporation, the sum of Six Thousand Eight Hundred Five and 40/100 ($6805.40) Dollars, together with interest thereon from November 9th, 1927, at the rate of six per cent per annum, together with all cost in this behalf expended, with the exception of such costs as have heretofore been adjudged against the plaintiffs by the Court of Civil Appeals and the Supreme Court, for all of which let execution issue.

Endorsed: No. 7043, Pinson & Guyger vs Bain Peanut Company of Texas, Decree. Recorded in Vol. "S", pages 320-1-2.

[fols. 21–26] In District Court of Comanche County

Assignments of Error

Now comes Bain Peanut Company of Texas, defendant in the above entitled and numbered case, and assigns as error the action of the court on the trial of this case in overruling defendants General Demurrer to the controverting affidavit of plaintiffs in reply to defendants plea of privilege heretofore filed herein, and says the trial court erred in overruling said general demurrer and erred in refusing to sustain the same and transfer this cause to one of the District Courts of Tarrant County, Texas, as prayed for in defendant's plea of privilege, in that subdivision 23 article 1995 Revised Statutes of the State of Texas, with reference to venue of suits against a corporation under which plaintiffs controverted defendant's plea of privilege, and under which the court sustained the right of plaintiffs to sue defendant in Comanche County, Texas as against its plea of privilege, is unconstitutional and void and is in violation of the Fourteenth Amendment of the United States of America as being a discriminating classification between individuals and private corporations with respect to venue.

[fol. 27] IN COURT OF CIVIL APPEALS OF TEXAS, ELEVENTH SUPREME JUDICIAL DISTRICT

691-492

BAIN PEANUT COMPANY OF TEXAS

vs.

PINSON & GUYGER

JUDGMENT—July 12, 1929

This day came on to be heard, appellee's motion for rehearing, and the same having been duly considered by the Court, the court is of the opinion that said motion is well taken and should be granted; It is therefore the order, judgment and decree of the Court that appellee's motion for rehearing be and the same is hereby in all things granted, and that the previous order of this court entered on May 3, 1929, reforming the judgment of the trial court is hereby set aside and held for naught and the judgment of the trial court is hereby in all things affirmed; that Pinson & Guyger do have and recover of and from Bain Peanut Company of Texas and its surety, United States Fidelity and Guaranty Company, the amount adjudged below. It is further ordered that Bain Peanut Company of Texas and its surety, United States Fidelity and Guaranty Company, pay all costs incurred by reason of this appeal, for which let execution issue, and that this decision be certified below for observance.

[fol. 28] IN COURT OF CIVIL APPEALS OF TEXAS

[Title omitted]

Appeal from the District Court of Comanche County

CERTIFIED QUESTION TO SUPREME COURT OF TEXAS

To the Honorable Supreme Court:

The above cause is pending in this court on submission. Appellant is a private corporation having its principal

place of business in Tarrant County. It was sued by appellees in Comanche County. To this suit it filed its plea of privilege to be sued in Tarrant County, the controverting plea of appellees to this plea of privilege sought to hold the venue in Comanche County under Subdivision 24 of Art. 1830, R. S., 1911, the statute in force at the time the pleading was filed. This exceptional provision appears in substantially the same form as Subdivision 23, Art. 1995, R. S., 1925. No other exceptional provision was relied upon by appellees to maintain venue in Comanche County. A general demurrer to the controverting plea was overruled and the case tried on its merits, resulting in a judgment in favor of appellees against appellant.

It becomes necessary, for a correct disposition of the appeal, to determine whether the trial court erred in overruling the demurrer to the controverting plea. It was not [fol. 29] claimed in the plea that appellant had an agency or representative in Comanche County, or that its principal office was situated therein, the claim being only that the cause of action, or a part thereof, arose in that county.

In the recent cases of Dublin Mill & Elevator Company vs. Cornelius, 5 S. W., (2d) 1027, and Houston Lighting & Power Company vs. Jenkins, 5 S. W., (2d) 1030, the Honorable Court of Civil Appeals for the Third District, at Austin, held that that portion of this exceptional provision authorizing suits against private corporations in any county in which a cause of action or a part thereof arose, involved a discrimination between an individual citizen and the private corporation, and was, therefore, repugnant to the Fourteenth Amendment of the Constitution of the United States, in that it deprives such corporation of the equal protection of the laws as well as protection of equal laws.

It is our opinion that a question of so frequent application and general importance should be authoritatively determined by the Supreme Court, and we, therefore, deem it advisable to certify to Your Honorable Court for decision the following question:

Is that provision of Subdivision 23, Art. 1995, R. S., 1925, readings as follows: "Suits against a private corporation, association or joint stock Company may be brought in any county in which the cause of action, or a part thereof,

arose," repugnant to the Fourteenth Amendment to the Constitution of the United States?

[fols. 30-32] An answer to the above question is respectfully requested.

John Edward Hickman, Chief Justice Court of Civil Appeals, 11th Supreme Judicial District.

"The foregoing certificate is ordered withdrawn from the Supreme Court because that Court, before acting upon it, has upheld the Constitutionality of the Statute involved in the case of Greyburg Oil Co. vs. N. P. Powell, — Texas, —; 15 S. W. (2nd) 542.

Done at Eastland, Texas, this 8th day of April A. D. 1929.

John Edward Hickman, Chief Justice Court of Civil Appeals, Eleventh Supreme Judicial District of Texas.

[fol. 33] In Court of Civil Appeals of Texas

No. 492

Bain Peanut Company of Texas, Appellant,

vs.

Pinson & Guyger, Appellees

Appeal from the District Court of Comanche County

Opinion—Filed July 12, 1929

This is the third appeal of this case. The first was from a judgment on a plea of privilege, the second and third from trials on the merits. The last trial which was before the court and jury resulted in a judgment on special issues in favor of the plaintiff, and the defendant Bain Peanut Company appeals.

The appellees as partners brought this suit against the apellant for damages arising from a breach of an alleged contract which was specifically alleged in paragraph 1 of their petition, as follows:

"That * * * on or about the first day of November, 1923, the defendant, Bain Peanut Company, acting through and by its duly authorized * * * agent, Bill Huxford, came to plaintiffs at Proctor, Comanche County, Texas, and entered into a contract with plaintiffs, by which it was agreed between the plaintiffs and defendant that the plaintiffs, who were dealers in and purchasers of peanuts, would buy peanuts for the defendant on the open market during the peanut season of 1923 and 1924 which was then just beginning, and that plaintiffs would buy peanuts for no other parties. It was agreed that plaintiffs would pay their own money for the peanuts, which were to be purchased at the best price obtainable on the current market from day to day, and would store the said peanuts in a storehouse at Proctor, Texas, agreed on at the time between plaintiffs and defendant. That the said peanuts would be stored in such a manner as to cure and dry properly for shipment to the defendant's central plant or mill at Fort Worth, Tarrant County, Texas, where it was agreed that the peanuts [fol. 34] would be shipped as son as properly cured. That the plaintiffs would pay the storage and insurance on the peanuts while in storage, and drayage to the cars when they should be ready to ship to the defendant, as aforesaid. It was agreed that defendanf would reimburse the plaintiffs for the original cost of the peanuts and for their insurance, storage and drayage, and pay the plaintiffs for their services a commission of ten cents on every bushel which they should buy for the defendant."

In subsequent paragraphs of the plaintiff's petition, estoppel and ratification were pleaded, and further:

"That the plaintiffs, all during the said peanut season, conferred from time to time with the defendant's agent (Huxford) and acted under the direction of the defendant's agent in making the purchases and in storing and handling the peanuts."

It was alleged that under and by virtue of said contract the plaintiffs purchased 6,981 bushels of peanuts of an aggregate value of $12,455.78, and that after said peanuts had been purchased, insured, stored, cured and handled in every way in accordance with the above mentioned contract, the plaintiffs demanded of the defendant, Bain Peanut Com-

pany, that it accept the shipment of peanuts and pay plaintiffs therefor according to the original contract. That the defendant refused to comply with the contract and rejected the peanuts, which were later sold by the plaintiffs for $7,374.20, the best price obtainable. This lawsuit is for the difference between that sum and the amount paid by plaintiffs for the peanuts, together with the sum of $46.10 drayage, $178.89 insurance, and an alleged commission of $698.10, aggregating $6,004.67, an alleged loss proximately resulting to plaintiffs by reason of the defendant's breach of the alleged contract, performable in Comanche County, Texas.

[fol. 35] The defendant interposed a plea of privilege to be sued in Tarrant County, Texas, and subject to this plea entered a general denial, etc.

The proposition on the court's action in overruling the plea of privilege to be sued in Tarrant County arises from the overruling of the defendant's demurrer to the plaintiffs' controverting affidavit. The plaintiffs rested their right to revenue in Comanche County upon the ground that the suit was against a private corporation on a cause of action arising in whole or in part in that county. This involved plaintiffs' right to hold venue in that county under subdivision 23, Art. 1995, R. S., which subdivision has recently been held discriminatory against private corporations, and therefore, unconstitutional. See Dublin Mill & Elevator Company vs. Cornelius, 5 S. W., (2d) 1027; Houston Light & Power Company vs. Jenkins, 5 S. W., (2d) 1030. However, those cases have recently been overruled by the Commission of Appeals in an opinion in the case of Grayburg Oil Company vs. N. P. Powell, approved by the Supreme Court. The point calls for no further consideration and the proposition presented is overruled.

One of the main contentions of the appellant is that the trial court erred in refusing to grant a new trial because of the newly discovered evidence of the witness Chisholm. More than ordinary showing is made in support of this proposition. There is, however, one reason appearing which forces us to the conclusion that the case should not be reversed because of this matter alone. At the time of the former trial appellant had notice that this witness probably knew facts material to the case. When the witness was [fol. 36] then asked by appellant's attorney about the mat-

ter he did not disclaim any such knowledge, but replied that if he was put on the witness stand he would tell the truth. This statement alone implied some knowledge. Appellant showed no lack of diligence by its failure to place him on the stand at that trial, not knowing what his testimony would be, and the trial being then in progress. Had this occurred at the last trial of the case when there was no time in a legal way to ascertain what he knew without being bound by what he said, we would be inclined to hold that appellant was fully acquitted of any want of diligence; but a year or more intervening between that time and the time the case was finally brought to trial, the appellant had ample opportunity to take the depositions of the witness and compel him to disclose his knowledge of the facts. Appellant having failed to do so, we think we would not be justified in holding that the trial court abused its discretion in refusing a new trial. Particularly do we think we are justified in this holding, in view of the fact that the witness Chisholm, when later approached, voluntarily made and delivered to appellant an affidavit setting forth the testimony it is claimed he would give on a re-trial of the cause. This proposition is overruled.

The judgment of the court below is challenged on the ground that there was no evidence of any authority on the part of Huxford as agent of the Bain Peanut Company to make the contract in question. The same question was pre- [fol. 37] sented on the former appeal and it appears that at the last trial the cause was tried on the same pleading as at the first trial and on substantially the same testimony. (287 S. W., 87.) In discussing the above contentions on the former appeal, this court said:

"The charge as a whole was excepted to and a peremptory instruction requested because the evidence introduced had no basis in appellees' pleading. It is asserted that the plaintiff's petition was based upon an alleged employment of appellees by Huxford as sub-agents for appellant to buy peanuts in unlimited quantities on their own judgment, and that the evidence showed conclusively that Huxford had no such authority. It is agreed that Huxford did not have authority to employ appellees as sub-agents to buy peanuts for appellant in unlimited quantities on the unrestrained judgment of appellees as to quantities and price, but we

do not concur in appellant's claim that such was the case made by the petition. The petition alleged specifically that the peanuts were bought from day to day under the immediate direction and control of Huxford. This allegation is a sufficient answer to the contention noted."

From the above quotation it conclusively appears that this court on the former appeal held that the plaintiff's petition sufficiently alleged a cause of action warranting recovery on the contract pleaded. The evidence supports the conclusion that the peanuts were, in fact, purchased under Huxford's supervision. Thus it appears that on the former appeal it was expressly held that Huxford had authority to make the questioned contract,—and that the pleadings were interpreted as declaring upon such contract as being a sufficient basis for recovery. On the former appeal the case reached the Supreme Court, and upon an opinion by the Commission of Appeals the Supreme Court reversed the judgment of this court and reformed and affirmed the judgment of the district court. In the Commission's opinion this language is used:

[fol. 38] "While there are thirty assignments of error contained in the application, none, other than that raising the question here discussed, presents an error which would require a reversal of reformation of the judgment of the trial court." (292 S. W., 203.)

The assignment sustained in that opinion raised a question of the right to recover interest as damages, etc. On motion for rehearing the Commission of Appeals, in its second opinion used this language:

"In our former opinion in this case we stated that 'while there are thirty assignments of error contained in the application, none, other than that raising the question here discussed, presents an error which would require reversal or reformation of the judgment of the trial court.' 292 S. W., 203. We are now of the opinion that one of the assignments does present reversible error." (294 S. W., 536.)

The assignment this time sustained was to the action of the court in admitting hearsay testimony. The judg-

ments of the district court and the Court of Civil Appeals were reversed upon the recommendation of the Commission upon that sole question.

Evidently the Supreme Court, through said opinions by the Commission, approved the interpretation or construction placed on the pleadings by this court on the former appeal, and resolved against the appellant the contention that Huxford had no authority to make with Pinson & Guyger said contract. The assignments raising the question of no evidence of any authority on the part of Huxford as agent of the Bain Peanut Company to make the questioned contract having been considered, (as evidently appears from the last quotations) and over-ruled, by the Commis- [fol. 39] sion, with the approval of the Supreme Court, as well as by this court, and the pleadings remaining unaltered, the testimony admittedly the same, the trial court having followed the former holdings, and the errors working a reversal of the judgment of the trial court on the first trial having been removed, we believe that, in obedience to said opinions, said assignments (again appearing in this record presenting the same contention) should be overruled, and the judgment affirmed. In doing so we regard the questions presented by the assignments as no longer open questions in this court.

There is no question but that the evidence in this record is sufficient to support the recovery if the contract declared upon in the petition is construed as alleging a contract for the purchase of peanuts from the appellees at such a price as to allow them to realize a profit of ten cents per bushel above the price paid and the necessary expenses incurred in preparing them for shipment, etc. On the other hand, if the contract declared upon be construed as one of subagency, then the evidence fails to establish authority in Huxford to bind the appellant thereby. The identical petition which is now before us has been construed by this court and evidently by the Supreme Court as declaring upon a contract of purchase. Therefore, if we should now view the petition differently we would not be authorized, as we understand the law and the powers of this court, to overrule what clearly appears to be a decision or holding of our Supreme Court.

[fols. 40 & 41] On original hearing the majority reformed the judgment of the trial court so as to exclude all items of recovery except the actual purchase price paid by appellees for the peanuts. Both parties have filed motions for rehearing, the appellant insisting that the judgment of the trial court be reversed and remanded on account of the insufficiency of the evidence to support any recovery, and the appellees insisting that the judgment of the trial court be in all things affirmed. Appellant's motion for rehearing will be overruled.

We believe that the agent Huxford was as fully authorized under the evidence to bind his principal for each element of the contract pleaded as he was to bind it to repay to appellees the purchase price of the peanuts, and that the contract in all of its terms was entire and not severable, and would support a recovery for the entire amount of the judgment below, if any recovery at all, and appellees' motion for rehearing is, therefore, granted.

The judgment heretofore entered by the court reforming the judgment of the trial court and affirming same as reformed, is set aside and the original opinion withdrawn, and in lieu thereof judgment will be here entered in all things affirming the judgment of the trial court, and this opinion will be substituted for the original.

W. P. Leslie, Associate Justice.

July 12th, 1929.

[File endorsement omitted.]

[fol. 42] In Court of Civil Appeals of Texas

[Title omitted]

Dissenting Opinion—Filed July 12, 1929

The writer is unable to concur in the opinion of the majority. The majority opinion simply adopts the construction of the pleadings in the former appeal. (287 S. W., 87.) No effort is made to justify that construction, and appar-

ently the sole justification for now adhering to it is the fact that the Supreme Court, in overruling all assignments in a writ of error prosecuted from that judgment, except two relating to entirely different question, is to be presumed to have passed upon and adopted such construction. I do not think it is our duty to adhere to a construction of a pleading which is manifestly wrong upon the authority of a mere presumption that the Supreme Court has passed upon it and approved it.

I think this court erred in its opinion upon the former appeal in failing to distinguish between allegations of the terms of the contract and allegations of operations under the contract. Upon that appeal it was contended by the appellant that the judgment should be reversed because plaintiff's petition was based upon an alleged employment of appellees by Huxford as sub-agents for appellant to buy peanuts in unlimited quantities on their own judgment, and that the evidence showed conclusively that Huxford had no such authority. In overruling that contention this [fol. 43] court for answer replied:

"The petition alleged specifically that the peanuts were bought from day to day under the immediate direction and control of Huxford. This allegation is a sufficient answer to the contention noted."

Manifestly it was not a sufficient answer, unelss it was an allegation of one of the provisions of the contract. Certainly, if the contract was one of employment, authorizing the agents to buy peanuts in unlimited quantities on their own judgment, any question of the agent's authority to make such contract could not be affected by anything done under the contract short of a ratification or estoppel. The judgment was not rested upon ratification or estoppel, nor indeed could it have been under the evidence in the case. The alleged terms of the contract are correctly set out in the majority opinion. It will be noticed that it is not one of such provisions that the peanuts were to be "bought from day to day under the immediate direction and control of Huxford." That allegation occurs in a recitation of what was done under the contract, and at a time subsequent to the making of same. Some of the provisions of the contract as alleged were that—

"Plaintiffs * * * would buy peanuts from the defendant on the open market during the peanut season of 1923 and 1924 * * * and that plaintiff would buy peanuts for no other party. It was agreed that plaintiffs would pay their own money for the peanuts which were to be purchased at the best price obtainable on the current market from day to day." (Italics ours.)

[fol. 44] In making proof of the contract containing such provisions it would have been a material variance to offer evidence of another provision, (not alleged), "that the plaintiffs all during the said peanut season" were to confer "from time to time with defendant's agent (Huxford)", and to act "under the direction of the defendant's agent in making the purchases and in storing and handling the peanuts." Such allegation was not only not made as a provision of the contract, but was not attempted to be proved as such, but merely of what was done under the contract. It is, therefore, clear to me that upon the former appeal this court sustained a recovery in behalf of appellants upon an entirely different contract in terms and legal effect than the one alleged in the petition. In order to bind appellee it was necessary to show, not that Huxford had authority to buy the peanuts or to make some kind of contract, but that he had authority to make the particular contract, alleged. The principle is so well established as often to be called axiomatic, that in a suit upon a contract the identical contract alleged must be proved.

Padgett Bros. vs. Dorsey, 194 S. W., 1124;
Gammage vs. Alexander, 14 Tex., 418;
Bagley vs. Black, 254 S. W. 247;
Western Union Tel. Co. vs. Smith, 88 Tex., 9, 28 S. W., 930, 30 S. W., 549.

The principle underlying this rule likewise requires that proof authority of an agent to make a contract means the particular contract in question and not another.
[fol. 45] Plainly the contract alleged is not one by which appellees agreed to sell peanuts to Bain Peanut Company. The contract alleged is one by which appellees were employed, not to sell peanuts to Bain Peanut Company, but

to purchase peanuts from day to day on the open market for the best price obtainable, as its agents and representatives, and for which services, among other things, a specified compensation was to be paid them. In operating under the contract alleged the ownership of the peanuts would pass immediately from the sellers in the open market, not to appellees, but to Bain Peanut Company. True, according to the allegations, appellees were to pay for the peanuts with their own money, but the allegations make clear that this was an advancement for Bain Peanut Company for which reimbursement was sought. What authority had Huxford to agree that Bain Peanut Company would pay appellees ten cents a bushel as a commission to purchase peanuts for it? If any such exists, it is implied by law from Huxford's status as agent with authority to purchase peanuts, for it cannot be gainsaid that there is not a word of testimony to show any express authority or any facts other than that of agency, and authority to purchase peanuts, from which such authority can be inferred. If he had implied authority to make such contract he could just as well have bound his principal to pay a salary of, say $100.00 a month. It certainly cannot be that any such authority exists by implication. What authority was Huxford shown to have had to bind Bain Peanut Company to reim- [fol. 46] burse appellees for such sums as they should advance to purchase peanuts? He had just as much authority to contract for a loan with the Proctor Bank for $10,000.00 with which to purchase peanuts and thereby obligate Bain Peanut Company to repay it, for, in either case it must be implied by law from the fact of agency and authority to purchase peanuts alone, there being no other evidence of authority. Suppose the agent had contracted with the bank for the $10,000.00 loan and had wholly misapplied it. Could it be contended for a moment that the bank could recover the advances from Bain Peanut Company upon proof of no other authority on the part of Huxford than is shown by this record, which, as said before, consists solely of the fact he was agent, with authority (limited at that), to purchase peanuts. If Huxford had no authority to contract for the payment of the commissions, then whatever other authority he had he could not bind appellant by the

particular contract alleged. As said in the majority opinion, the contract is one and indivisible. The authority requisite to make such contract must include authority to make every part of it.

Independently of everything else, the principle that one must recover, if at all, on the precise contract alleged, forbids a recovery in this case, because while the pleading alleged that one provision of the contract was that appellant would pay appellees ten cents a bushel for all peanuts purchased under the alleged contract, appellees themselves testified that the contract was that ten cents per bushel for such as were loaded on cars directly from wagons. Appellees thus affirmatively disproved the existence of the [fol. 47] contract alleged.

Much more might be said argumentatively to show that the contract alleged is not properly susceptible of any construction that would bring it within the authority of Huxford to make, as disclosed by undisputed evidence, but the above, it is thought, is sufficient to show the basis of my conclusion that the judgment of the trial court should be reversed and remanded.

O. C. Funderburk, Associate Justice.

July 12th, 1929.

[File endorsement omitted.]

[fol. 48] In Court of Civil Appeals of Texas

[Title omitted]

Appellant's Second Motion for Rehearing—Filed July 27, 1929

To the Honorable Court of Civil Appeals:

Since the Court on July 12, 1929, vacated and set aside both its original judgment and opinion rendered on May 3, 1929, and substituted in lieu thereof a judgment in all things affirming the judgment of the trial court as well as a new opinion, appellant now presents its motion for rehearing addressed to the judgment and opinion of the Court under date of July 12—being the only existing judgment and opinion of the Court on this Appeal.

Appellant respectfully represents that in affirming the judgment of the trial court, the Court committed prejudicial errors against it in the particulars hereinafter set out, which are submitted with prayer that the case be reversed and render or at least remanded for a new trial.

III

The Court erred in overruling appellant's Second assignment of error briefed under its second and third propositions and in sustaining the validity of Section 23, Art. 1995, [fol. 49] Revised Civil Statutes of Texas, despite the constitional objection that said statute arbitrarily discriminates in this case against appellant, a corporation, with respect to venue; and erred in declining to reverse and remand the cause with instructions to sustain appellant's plea of privilege to be sued in Tarrant County, Texas, because of the unconstitutionality of said statute.

Wherefore, appellant prays that its motion for rehearing be granted, the judgment of affirmance be set aside and that the case be reversed and rendered or reversed and remanded with instructions to sustain its plea of privilege and transfer the cause to Tarrant County for trial; or finally, in the event each of the foregoing prayers be denied, that the case be reversed and remanded for a new trial.

Bryan, Stone, Wade & Agerton, by B. G. Mansell, and B. G. Mansel, of Fort Worth, Texas, and George E. Smith, of Comanche, Texas, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 50] In Court of Civil Appeals of Texas

[Title omitted]

Order Overruling Appellant's Second Motion for Rehearing—October 18, 1929

This day came on to be heard, Appellant's second motion for rehearing, and the same having been duly considered by the court, is hereby overruled.

[fol. 51] IN SUPREME COURT OF TEXAS

APPLICATION FOR WRIT OF ERROR—Filed in Court of Civil Appeals Nov. 11, 1929; in Supreme Court Nov. 14, 1929

To the Supreme Court of Texas:

Grounds of Jurisdiction

Defendants in error sued for and recovered more than $1,000.00, hence the jurisdiction of the Court of Civil Appeals is not final under Article 1821, Revised Civil Statutes, 1925. The Supreme Court has jurisdiction for the several reasons set out below.

First Ground—Disagreement of Judges of Court of Civil Appeals

The Judges of the Honorable Court of Civil Appeals disagreed in their determination of this case upon a question of law material to the decision.

Fourth Ground—Validity of a Statute

As indicated in the preliminary statement plaintiff in error is a corporation domiciled in Tarrant County, Texas. In due time it presented its plea of privilege in statutory form seeking thereby to have the case transferred to one of the Civil District Courts of Tarrant County, Texas, for trial. The plea of privilege was controverted, and plaintiff in error demurred generally to the controverting affidavit. The demurrer was presented to and overruled by the Trial Court and due exception taken. Before expiration of the time for taking transcript out of the office of the District Clerk plaintiff in error filed, and there appears at page 10-f [fol. 52] of the Transcript, its assignment of error attacking the validity of that portion of subdivision 23, Article 1995, Revised Statutes of the State of Texas, which provides that a corporate defendant may be sued in any county in the State of Texas wherein the cause of action asserted against defendant, or any part thereof, arises. Defendants in error did not seek to maintain venue in Commanche County, Texas, under any other provision or subdivision

of the Venue Statute except that mentioned. By appropriate assignments of error and propositions in its original brief plaintiff in error urged upon the Court of Civil Appeals its contention that the portion of subdivision 23 Article 1995, Revised Statutes, referred to above, is a legislative attempt to discriminate against corporations and in favor of individuals similarly situated with respect to venue, and that said statute is therefore unconstitutional and void because in violation of the Fourteenth Amendment to the Constitution of the United States of America, which provides for the equal protection of laws and protection of equal laws between all citizens of the United States similarly situated. The Court of Civil Appeals overruled the contention noted and upheld the validity of the statute under authority of the case of Grayburg Oil Co. vs. N. P. Powell 15 S. W. (2nd) 542. In both its original and second motion for rehearing plaintiff in error assigned [fol. 53] and now assigns as error the action of the Court of Civil Appeals in upholding the validity of said statute and in refusing to reverse and remand the case to the District Court of Comanche County, Texas, with instructions to transfer it to one of the Civil District Court of Tarrant County, Texas, for trial.

Third Assignment (Being the Third Assignment in Plaintiff in Error's Second Motion for Rehearing, p. 2)

"The Court erred in overruling appellant's second assignment of error briefed under its second and third propositions and in sustaining the validity of Section 23, Art. 1995, Revised Civil Statutes of Texas, despite the constitutional objection that said statute arbitrarily discriminates in this case against appellant, a corporation, with respect to venue; and erred in declining to reverse and remand the cause with instructions to sustain appellant's plea of privilege to be sued in Tarrant County, Texas, because of the unconstitutionality of said statute."

Proposition

Plaintiff in error, Bain Peanut Company, having interposed in its plea of privilege in statutory form to be sued

in one of the District Courts in Tarrant County, Texas, and defendants in error having contested plaintiff in error's right to have said case transferred to Tarrant County, Texas, solely upon the ground that plaintiff in error was a corporation and that their alleged cause of action, [fol. 54] or a part thereof, occurred in Comanche County, Texas, and that plaintiff in error was therefore properly suable in Comanche County, Texas, under subdivision 24, Article 1830, Revised Statutes, 1911, (now being subdivision 23, Article 1995, Revised Statutes, 1925) and plaintiff in error having challenged the sufficiency of said controverting affidavit by general demurrer, the Court should have sustained general demurrer to defendants in error's controverting affidavit, and should have thereupon transferred this cause to one of the District Courts of Tarrant County, Texas, without further proceedings, as prayed for in said general demurrer, said subdivision 24, Article 1830, (Subdivision 23, Article 1995) being unconstitutional and void as being a discriminating classification in favor of individuals and against private corporations with respect to venue and therefore in violation of Section 1, of the 14th Amendment to the Constitution of the United States of America. (Being proposition No. 2, p. 7, Appellant's Original Brief, except that plaintiff in error is so designated in lieu of "Defendant" in said proposition.)

Authorities

Power Manufacturing Co. v. Saunders, 274 U. S. 489; 71 L. ed. 1165;

Kentucky Finance Co. v. Paramount Auto Exchange Co. 67 L ed. 1112;

Liggett Co. v. Baldridge, 73 L. ed. 45;

[fol. 55] Quaker City Cab Co. v. Pennsylvania, 72 L. ed. 927;

Frost v. Corporation Commission of Oklahoma, et al. 73 L. ed. 483.

Wherefore Plaintiff in error respectfully prays that this Honorable Court do grant a writ of error to the Honorable Court of Civil Appeals in order that the errors herein

pointed out and complained of may be reviewed and corrected. It further prays that on final hearing judgment of the Court of Civil Appeals and the Trial Court be reversed and rendered for plaintiff in error; or, in the alternative, that the judgment of both of said Courts be reversed and remanded, with directions that plaintiff in error's plea of privilege to be sued on one of the District Courts of Tarrant County, Texas, be sustained and the case transferred accordingly, as prayed for, that justice may be done.

Respectfully submitted.

Bryan, Stone, Wade & Agerton, by B. G. Mansell, Fort Worth, Texas, and George E. Smith, Comanche, Texas, Attorneys for Plaintiff in Error.

[fols. 56–58] [File endorsements omitted.]

[fol. 59] IN SUPREME COURT OF TEXAS

MOTION FOR REHEARING ON APPLICATION FOR WRIT OF ERROR—Filed Dec. 21, 1929

To the Supreme Court of Texas:

Bain Peanut Company of Texas, plaintiff in error, respectfully presents and urges this its motion for rehearing upon its petition for writ of error and prays the Court to set aside its order of December 11, 1929, dismissing said petition as for want of jurisdiction, and prays that said petition be granted, and that a writ of error be issued to the Honorable Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas for revision of the errors there committed in its disposition of said case.

Your petitioner respectfully submits that this Court has jurisdiction to grant its petition for writ of error because:

Plaintiff sued for and recovered more than $1,000.00; because upon final affirmance of the case below a motion for rehearing was duly presented urging each one and all of the questions involved in its petition for writ of error; because within thirty days after order overruling its motion for rehearing by the Court of Civil Appeals, its petition for writ of error was duly filed in the Court of Civil Ap-

peals and is now lodged in this Court and is before your Honors. Reference is here made to said petition for writ of error and petitioner respectfully prays that said petition in its entirety be considered as a part of this motion to the same extent as if here copied at length.

The jurisdiction of this Court is invoked and petitioner believes that that jurisdiction exists and should be granted [fol. 60] because:

(a) Associate Justice Funderburk of the Court of Civil Appeals dissented from the majority of the Court upon a proposition of law determinative of the issues of this case on the merits, to-wit, as to the proper construction of the contract declared upon by plaintiff below.

(c) Because the opinion of the Court of Civil Appeals involved the validity of a statute, to-wit; that portion of Subdivision 23, Article 1995, R. C. S., which subjected the defendant, a corporation, to suit in Comanche County, in the face of its plea of privilege to have the cause removed to Tarrant County, Texas, its domicile, for trial, solely on the ground that defendant was a corporation and that a part of the alleged cause of action arose in Comanche County, Texas. Defendant called into question the validity of said statute on the theory that it violated the Fourteenth Amendment to the Constitution of the United States, and its right thereunder, in that, said statute attempts to create an arbitrary classification discriminating against it and other corporations and in favor of individual litigants similarly situated with respect to venue of causes of action.

Subjoined hereto is an argument in support of the right of the Court to exercise its potential jurisdiction and to grant its petition for writ of error; and petitioner earnestly invites a careful consideration of that argument to the end that the order heretofore entered dismissing said petition as for want of jurisdiction be set aside, the applica- [fols. 61 & 62] tion granted and the case reversed on final hearing on the merits, that justice may be done.

Respectfully submitted.

Bryan, Stone, Wade & Agerton, by W. A. Keeling,
Attorneys for Petitioner.

Wherefore plaintiff in error respectfully and earnestly prays that its motion for rehearing and petition for writ

of error be granted, and that on hearing the case be reversed and remanded that justice may be done.

Bryan, Stone, Wade & Agerton, by B. G. Mansell,
Attorneys for Plaintiff in Error.

[File endorsement omitted.]

[fol. 63 & 64] In Supreme Court of Texas

[Title omitted]

Order Dismissing Application for Writ of Error for Want of Jurisdiction—December 11, 1929

This day came on to be heard the application of plaintiff in error for a writ of error to the Court of Civil Appeals for the Eleventh District and the same having been duly considered, it is ordered that the application be dismissed for want of jurisdiction; that applicant Bain Peanut Company of Texas and surety, U. S. Fidelity & Guaranty Co., pay all costs incurred on this application.

In Supreme Court of Texas

[Title omitted]

Order Overruling Motion for Rehearing of Application for Writ of Error—January 22, 1930

For rehearing of Application No. 17123. Overruled.

[fol. 65] In Court of Civil Appeals of Texas

[Title omitted]

To the Honorable William Howard Taft, Chief Justice, and to the Honorable Associate Justices of the United States Supreme Court.

Petition for Appeal, Assignment of Error, and Prayer for Reversal—Filed Jan. 23, 1930

I

Petition for Allowance of Appeal

Considering themselves aggrieved by the final decision of the Court of Civil Appeals for the Eleventh Supreme

Judicial District of the State of Texas in the above entitled cause, Bain Peanut Company of Texas, joined herein by United States Fidelity and Guaranty Company, surety on its supersedas bond on appeal to said Court of Civil Appeals, appellants herein, hereby pray that an appeal be allowed from said Honorable Court of Civil Appeals to the Supreme Court of the United States, and for an order fixing the amount of the bond thereon.

Appellants respectfully represent that this case is one in which a review could have been had in the Supreme Court of the United States on writ of error under Sub-[fol. 66] division (a), Section 237, of the Judicial Code of the United States, as the same stood and was in force when the Act of January 31, 1928, abolishing the writ of error, was passed in this:

Appellant Bain Peanut Company of Texas, a private corporation organized under the laws of Texas, having its domicile in Tarrant County, Texas, was sued by appellees in the District Court of Comanche County, Texas. In due time and form said appellant presented its plea of privileges (statutory motion for change of venue) to the trial court praying that the case be transferred to one of the civil district courts of Tarrant County, Texas, for trial. Under the local practice, appellees controverted the plea of privilege and sought to sustain venue in the District Court of Comanche County under allegations and proof of the following facts alone:

(a) That Bain Peanut Company of Texas was a private corporation and,

(b) That the alleged cause of action arose in Comanche County, Texas. The general venue Statute of Texas in effect when the suit was filed (being now Article 1995, Revised Civil Statutes of Texas), provides that:

"No person who is an inhabitant of this State shall be sued out of the county in which he has his domicile except in the following cases:"

Subdivision 23 of said Article 1995, under which appellees controverted the plea of privilege and prayer for removal to Tarrant County reads in part as follows:

"Suits against a private corporation, association or joint stock company may be brought in any county in which the cause of action, or a part thereof, arose" * * *.

[fol. 67] Appellant Bain Peanut Company of Texas, by amended plea of privilege, demurred generally to the legal sufficiency of the controverting affidavit and again prayed for transfer of the case as in the first instance. The demurrer was overruled, and by appropriate assignment of error filed in the trial court the constitutionality of that portion of Subdivision 23, Article 1995, Revised Civil Statutes, was challenged as being in violation of the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that it arbitrarily discriminated against said appellant, a private corporation, by subjecting it to suit in a county other than its domicile solely on the ground that it was a private corporation, and that the cause of action arose in Comanche County,—there being no provision of the venue statute under which individual or other litigants or classes of litigants than those named in the subdivision are suable outside of the counties of their domiciles upon the ground that a cause of action arose elsewhere; and that said statute in its application deprived said appellant of the equal protection of laws to which it is entitled under said constitutional provision as a citizen of the United States.

The Federal question thus raised was urged in the Honorable Court of Civil Appeals, considered and overruled by that court which held the statute complained of to be a valid enactment. That holding was assigned as error in motion for re-hearing before the Honorable Court of Civil Appeals; and after that Court had overruled the motion for re-hearing, said appellant presented its petition for writ of error to the Supreme Court of Texas, again urging the error so assigned. On December 11, 1929, the State Supreme Court dismissed the petition for [fol. 68] writ of error for want of jurisdiction, and on the 22nd day of January, 1930, overruled motion for rehearing on petition for writ of error, thus declining to take jurisdiction of and review the judgment of the Honorable Court of Civil Appeals and rendering the judgment of the latter court final.

It is thus seen that under the legislation in force when the Act of January 31, 1928, abolishing the writ of error, was passed, a review of the case could have been had in the Supreme Court of the United States by writ of error in that the judgment appealed from is a final judgment in the highest court of the State of Texas in which a decision in the suit could be had, where is drawn in question the validity of a statute of this State (Texas), on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity. Section 237, United States Judicial Code, Subdivision (a).

II

Assignment of Error

And the said Bain Peanut Company of Texas and United States Fidelity and Guaranty Company assign the following error in the record and proceedings in this case:

1. The Honorable Court of Civil Appeals erred to the prejudice of appellants in upholding the constitutionality of the following portion of Section 23, Article 1995, Revised Civil Statutes of the State of Texas, to-wit:

"Suits against a private corporation, association or joint stock company may be brought in any county in which the cause of action, or any part thereof, arose"

[fol. 69] because said statute as upheld and applied in this case arbitrarily discriminates against appellant, Bain Peanut Company of Texas, a private corporation, by subjecting it to suit in a county other than its domicile in this: That individual and other litigants and classes of litigants than those named in said statute are not subject to suit outside of the counties of their domiciles upon the ground that "the cause of action, or a part thereof, arose" elsewhere. Wherefore appellants say said statute violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, and, in its application, deprives appellant Bain Peanut Company of Texas of the equal protection of law to which it is entitled under said constitutional provision as a citizen of the United States.

III

Prayer for Reversal

For which error the appellants, Bain Peanut Company of Texas and United States Fidelity and Guaranty Company, pray that the said judgment of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, dated July 12, 1929, in the above entitled cause, be reversed and a judgment rendered in favor of appellants, and for costs.

B. L. Agerton, Counsel for Appellants.

In Court of Civil Appeals of Texas

Order Allowing Appeal—Filed Jan. 23, 1930

The foregoing petition for allowance of an appeal and accompanying documents having been presented to me this 23rd day of January, 1930, the petition for appeal is allowed. Appeal and supersedas bond fixed at $10,000.00.

John Edward Hickman, Chief Justice Court of Civil Appeals for the 11th Supreme Judicial District of Texas.

[fol. 70] [File endorsement omitted.]

[fols. 71-73] Petition for stay of mandate and supersedeas and order thereon omitted in printing.

[fols. 74-82] Supersedeas bond on appeal for $10,000, approved and filed January 23, 1930, omitted in printing.

[fol. 83] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 83½] Court of Civil Appeals of State of Texas.

[fol. 84] In Supreme Court of the United States

Statement of Points to be Relied Upon and Stipulation as to Printing Record—Filed Feb. 18, 1930

Come now appellants in the above entitled cause and state that the point upon which they intend to rely in this Court in this case is as follows:

That the following portion of Section 23, Article 1995, Revised Civil Statutes of Texas (formerly Sec. 24, Article 1830, R. C. S.), viz:

"Suits against a private corporation, association, or joint stock company, may be brought in any county in which the cause of action, or a part thereof, arose"

violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, by arbitrarily discriminating against the class of litigants therein named. And said statute, as upheld and applied by the Court of Civil Appeals in this case, denied appellant Bain Peanut Company of Texas, a private corporation domiciled in Tarrant County, Texas, of the equal protection of law to which it is entitled under the Constitution as a citizen of the United States, by subjecting it to suit in Comanche County upon allegation and proof alone that "the cause of action, or a part thereof, arose" in Comanche County; other classes of defendants than those mentioned in said [fol. 85] statute not being subject to suit outside their domiciliary counties in a similar situation.

And appellants further state that only the following parts of the record, as filed in this Court, need by printed by the Clerk for the hearing of the case; page references being to the original record sent up from the Court below:

1. Plaintiffs' original petition, R. 2-6, omitting, however, numbered paragraphs 2, 3, 4, and 5; but the Clerk may state that said paragraphs allege performance by plaintiff and breach by defendant.

2. Defendant's answer, R. 7-8, omitting, however, numbered paragraphs 2, 3 and 4; but the Clerk may state that

paragraphs 2 and 3 are special exceptions and 4 a general denial.

3. Plaintiffs' controverting affidavit, R. 9-11, omitting verification and other matters at page 11.

4. Defendant's demurrer to plaintiffs' controverting plea and amended plea of privilege, R. 12-14.

5. Decree or judgment of trial court, R. 15-20; omitting, however, special issues and answers of the jury at pages 16 to 19.

6. Defendant's assignment of error, R. 21.

7. Certified question by the Court of Civil Appeals to the Supreme Court, and order withdrawing same, R. 28-30.

8. Judgment of the Court of Civil Appeals, R. 27.

9. Majority opinion of Court of Civil Appeals by Associate Justice Leslie, R. 33-40.

10. Dissenting opinion by Associate Justice Funderburk, R. 42-47.

11. Appellants' second motion for rehearing—as shown in record, R. 48-49, with file date.

12. Order overruling second motion for rehearing, R. 50.

13. Bain Peanut Company's petition for writ of error to [fol. 86] the Supreme Court—as shown in record, R. 51-55, with file date in Court of Civil Appeals and Supreme Court.

14. Bain Peanut Company's motion for rehearing on petition for writ of error—as shown in record, R. 59-61—with file date in Supreme Court.

15. Certified copies of orders by the State Supreme Court with Clerk's certificate, R. 63, showing:

(a)—Dismissal of petition for writ of error.

(b)—Order overruling motion for rehearing thereon.

16. Petition for allowance of appeal to the United States Supreme Court, including assignment of error and order of allowance, R. 65-69, with file date.

17. Appellants' point designated herein upon which they rely for reversal and this designation of the portion of the record to be printed, together with the subjoined stipulation.

B. L. Agerton, Counsel for Appellants.

Stipulation

I, Mark Callaway, a member of the firm of Callaway & Callaway, attorneys of record for appellees, hereby ac-

knowledge receipt, on behalf of appellees, of a copy of the foregoing point designated by appellants as the only point upon which they will rely for reversal in the United States Supreme Court, as well as a copy of the foregoing designation of the portions of the original record to be printed by the Clerk of the United States Supreme Court; and service thereof is hereby waived.

And we, the undersigned attorneys for appellants and appellees, respectively, agree that the matters set out in the foregoing designation for printing shall be printed by the Clerk as the record for hearing in this case; that the petition for and order granting supersedeas, appellants' supersedeas bond and order of approval thereon, and certificate of the Clerk of the Court of Civil Appeals may be omitted in printing, but the Clerk shall make proper reference [fol. 87] thereto in conformity with the rules of the United States Supreme Court. The Clerk may also omit all captions, endorsements and file marks from the printed record, except where called for in the foregoing designation and where necessary to indicate the character of the document referred to.

B. L. Agerton, Counsel for Appellants. Mark Callaway, Counsel for Appellees.

[fol. 88-95] [File endorsement omitted.]

Endorsed on cover: File No. 34,800. Texas Court of Civil Appeals for the Eleventh Supreme Judicial District. Term No. 669. Bain-Peanut Company of Texas and United States Fidelity & Guaranty Company, appellants, vs. Dave Pinson and G. B. Guyger. Filed Fe*n*ruary 15, 1930. File No. 34,800.

FILE COPY

Supreme Court, U.S.
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FEB 23 1939
CHARLES ELMORE CROPLEY
CLERK

No. ~~605~~ 49

—o—

In the

Supreme Court of the United States

—o—

BAIN PEANUT COMPANY OF TEXAS, ET AL., *Appellants,*

vs.

DAVE PINSON AND C. B. GUYGER, *Appellees.*

—o—

Appeal from the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas

—o—

STATEMENT IN SUPPORT OF JURISDICTION UNDER RULE TWELVE

—o—

B. L. AGERTON,
Cousel for Appellants.

BRYAN, STONE, WADE & AGERTON,
and
B. G. MANSELL,
Of Counsel.

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No. 669

—o—

In the

Supreme Court of the United States

—o—

BAIN PEANUT COMPANY OF TEXAS, ET AL, *Appellants,*

vs.

DAVE PINSON AND C. B. GUYGER, *Appellees.*

—o—

Appeal from the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas

—o—

STATEMENT IN SUPPORT OF JURISDICTION UNDER RULE TWELVE

—o—

To The Honorable Supreme Court of the United States:

I.
PRELIMINARY STATEMENT

This is an appeal from the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, allowed by the Honorable John Edward Hickman, Chief Justice thereof. The judgment appealed from was rendered July 12, 1929, but became final, for purposes of review by the United States Supreme Court, upon an order by the State Supreme Court overruling a motion for rehearing upon petition for writ of error from that Court to the Court of

Civil Appeals on January 22, 1930. The appeal was allowed January 23, 1930. The majority and dissenting opinions of the Court of Civil Appeals are reported in ..... Tex. Civ. App. .....; 19 S. W. (2nd) 203-207, (R. 69).

II.

POINT UPON WHICH APPELLANTS RELY FOR REVERSAL

Conformably to Section 9, Rule 13 of the United States Supreme Court appellants have designated the following as the only point upon which they rely here for reversal of the judgment below:

That the following portion of Section 23, Article 1995, Revised Civil Statutes of Texas, formerly Sec. 24, Art. 1830, R. C. S., viz:

> "Suits against a private corporation, Association, or joint stock company, may be brought in any county in which the cause of action, or a part thereof, arose"—

violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, by arbitrarily discriminating against the class of litigants therein named. And said statute, as upheld and applied by the Court of Civil Appeals in this case, denied appellant Bain Peanut Company of Texas, a private corporation domiciled in Tarrant County, Texas, of the equal protection of law to which it is entitled under the Constitution as a citizen of the United States, by subjecting it to suit in Commanche County upon allegation and proof alone that "the cause of action, or a part thereof, arose," in Commanche County; other classes of defendants than those

mentioned in said statute not being subject to suit outside their domiciliary counties in a similar situation.*

III.

GENERAL STATEMENT OF PROCEEDINGS BELOW, INCLUDING PERFECTING OF THIS APPEAL

It is submitted that the United States Supreme Court has jurisdiction to reveiw and reverse the case on this appeal because of the following matters manifest of record.

Appellant Bain Peanut Company of Texas (hereinafter simply called Bain Peanut Company), is a private corporation, organized under the laws of the State of Texas, having its domicile in Tarrant County, Texas (R. 2 and 28). It was sued in the District Court of Comanche County, Texas for damages arising from alleged breach of contract, and in due time and form presented a statutory motion for change of venue to Tarrant County, designated under the local practice as a plea of privilege. Appellees controverted the plea of privilege (R. 9-11), seeking to maintain venue of the suit in Comanche County upon allegation and proof alone of the following facts:

(a) that Bain Peanut Company was a private corporation, and

(b) that the alleged cause of action arose in Comanche County Texas (R. 9 and 10).

Said appellant replied by amended plea of privilege (R 12-14), by which it demurred generally to the legal sufficiency of the controverting affidavit, and again prayed

*See complete Venue Act, Appendix.

that the case be transferred to Tarrant County for trial. The demurrer was overruled and exception saved (R. 15). There was a jury trial resulting in judgment against said appellant for $6,805.40 (R. 19). Bain Peanut Company filed an assignment of error in the trial court attacking the validity of subdivision 23 of Article 1995, Revised Civil Statutes of Texas, under which appellees maintained venue in Comanche County; the ground of attack being that said Statute violated the Fourteenth Amendment to the Constitution of the United States as attempting a discriminating classification between individuals and private corporations with respect to venue, and complaining of the action of the court in overruling its said demurrer (R. 21).

On appeal, the Court of Civil Appeals submitted to the State Supreme Court a certified question seeking an opinion as to the validity of the portion of the statute in question; stating that its validity had been challenged as being repugnant to the Fourteenth Amendment of the Constitution of the United States, and that was necessary "for a correct disposition of the appeal, to determine whether the trial court erred in overruling the demurrer to the controverting plea," (R. 28). Before the Supreme Court answered said certified question it sustained the statute, against the constitutional objection urged, in another case, *Grayburg Oil Company vs. Powell,* ..... Texas .....; 15 S. W. (2d) 542. Whereupon the Court of Civil Appeals withdrew the certified question (R. 30), and on July 12, 1929, entered its judgment affirming the judgment of the trial court; likewise rendering judgment against appellant United States Fidelity & Guaranty Company (Surety on the supersedeas bond of Bain Peanut Company from the District Court of Comanche County,

to the Court of Civil Appeals), for the amount of the judgment below, interest and costs (R. 27); hence the joinder of said appellant in this appeal.

The Court of Civil Appeals sustained said statute, against the Federal constitutional question here urged, and affirmed the judgment of the trial court in overruling the demurrer of Bain Peanut Company to the controverting plea. (R. 35.)

As provided by Article 1877, Revised Civil Statutes, Bain Peanut Company filed its motion for rehearing in the Court of Civil Appeals within 15 days after July 12, 1929, (R. 49). The Federal constitutional question was again urged in said motion for rehearing (R. 48 and 49). The Court of Civil Appeals overruled the motion for rehearing October 18, 1929, (R. 50). Within the thirty day period allowed by Article 1742, Revised Civil Statutes, Bain Peanut Company filed its petition for writ of error from the Supreme Court of the State in the Court of Civil Appeals, assigning, among other grounds of jurisdiction, the Federal question here urged, (R. 51-54). The State Supreme Court on December 11, 1929, dismissed the petition for writ of error as for want of jurisdiction, (R. 63). Bain Peanut Company within fifteen days from the date of the order, as provided by Article 1762, Revised Statutes, filed in and presented to the State Supreme Court its motion for rehearing on petition for writ of error, praying reconsideration of the former action and again presenting the Federal constitutional question under discussion, (R. 60). The motion for rehearing was overruled by the Supreme Court January 22, 1930, (R. 63). The State Supreme Court thus finally declined to take jurisdiction of

the case; and the judgment of the Court of Civil Appeals became the final judgment as of January 22, 1930, and is in this case the judgment of the highest court of the State of Texas in which a decision can be had.

Bacon et al vs. State of Texas, 163 U. S. 207; 41 L. Ed. 132.

Sullivan vs. State of Texas, 207 U. S. 416; 52 L. Ed. 274.

St. Louis, San Francisco & Texas Ry. Co. vs. Maude Seale, 229 U. S. 156, 57 L. Ed. 1129.

On January 23, 1930, appellants presented to Honorable John Edward Hickman, Chief Justice of our said Court of Civil Appeals, a petition for allowance of an appeal to the United States Supreme Court, coupled with an assignment of error presenting the Federal question here urged (R. 65-69); a prayer for stay of execution and supersedeas (R. 71-72); and a supersedeas appeal bond in the sum of $10,000 (R. 74-76). On the same day the appeal was allowed by Chief Justice Hickman and the bond fixed (R. 69), the supersedeas granted (R. 72-73), and the bond approved and filed (R. 76), and the requisite citation issued. The citation and appellants' praecipe were served January 27, 1930, on one of appellees' attorneys of record, and said documents, together with return showing such service filed with the Clerk of the Court of Civil Appeals January 31, 1930, (R. 77-78, and 79-82). The certified record was filed in the United States Supreme Court, February 15, 1930. Appellants have designated the point upon which they rely for reversal and the portions of the record to be printed, secured service thereof, and have

filed same in this Court with proof of service within fifteen days after the case was here docketed.

IV.

DETAILED STATEMENT OF PROCEEDINGS BELOW, SHOWING PRESENTATION OF THE FEDERAL QUESTION IN EACH OF THE STATE COURTS, RULINGS THEREON, AND THAT APPELLANTS HAVE EXHAUSTED EVERY REMEDY PROVIDED UNDER STATE PROCEDURE FOR RELIEF.

Appellees, plaintiffs in the trial court, alleged that Bain Peanut Company was—

> "A private corporation duly incorporated and doing business under the laws of the State of Texas, with its principal office and place of business at Fort Worth in Tarrant County, Texas—" (R. 2).

Under Subdivision 7, Article 2010 Revised Civil Statutes of the State of Texas, an allegation in the pleadings of either party that the other party is a private corporation establishes the fact of such corporate character, in the absence of a sworn denial of such allegation.

> *Sovereign Camp W. O. W. vs. Ruedrich*, ... Tex. Civ. App. .....; 158 S. W. 170.

Bain Peanut Company made no such denial.

By Article 2007, Revised Civil Statutes, it is provided that a plea of privilege sworn to and conforming to the requirements thereof

> "Shall be prima facie proof of the defendant's right to change of venue."

The sufficiency of the plea of privilege (R. 12-14) was not questioned. The Court of Civil Appeals treated it as sufficient, holding in effect that it should have been granted but for the conclusion that the challenged statute was valid (R. 28-29, and 35). The Court of Civil Appeals by the certified question (R. 28), expressly found that Bain Peanut Company was a private corporation and that its domicile was in Tarrant County; and by necessary implication so found in its opinion (R. 35), in sustaining the validity of Subdivision 23, Article 1995, Revised Civil Statutes, and thus disposing of the demurrer to Appellees' controverting affidavit as necessary to a proper disposition of the appeal. Article 1820, Revised Civil Statutes, provides:

> "The judgment of the Court of Civil Appeals shall be conclusive in all cases on the facts of the case."

The Court of Civil Appeals entered its judgment of affirmance and rendered its opinion July 12, 1929. Article 1877 R. C. S. provides:

> "Any party desiring a rehearing of any matter determined by any Court of Civil Appeals, may, within fifteen days after the date of entry of the judgment or decision—file with the Clerk of said court his motion for rehearing thereof, in which the ground relied upon for the rehearing shall be distinctly specified," etc.

The motion for rehearing was filed July 27, 1929, (R. 49).

The motion for rehearing was a second motion, but it will be observed that the opinion and judgment dated July 12, 1929, were substituted for an opinion and judgment previously rendered and withdrawn. In such situa-

tion the State Supreme Court has held a second motion for rehearing to be an essential predicate for a petition for writ of error from that Court to a court of civil appeals.

Knox vs. McElroy, 103 Texas, 357; 127 S. W. 798;
Roth vs. Murray, 105 Texas, 6; 141 S. W. 515.

The second motion for rehearing was overruled by the Court of Civil Appeals, October 18, 1929. (R. 50.)

The jurisdiction of the Supreme Court of Texas is defined by Article 1728 R. C. S., viz:

Art. 1728:

"The Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, extending to all questions of law arising in the following cases when same shall have been brought to the Courts of Civil Appeals from final judgment of trial courts: * * *

3. Those involving the construction or validity of statutes necessary to a determination of the case."

But a review by the Supreme Court of Texas is not allowed as a matter of right; it is gracious and discretionary, and must be sought by petition for writ of error to the Courts of Civil Appeals. The Supreme Court of Texas in *S. A. & A. P. Ry. Co. vs. Blair*, 108 Texas 434; 196 S. W. 502, says:

"* * * Neither the right of appeal to the Supreme Court nor the manner of its exercise is mentioned in the Constitution.

"With this true, it is not to be questioned that the Legislature has the authority to establish the manner in which the appeal shall be taken, and, in doing so, declare *where shall rest the authority of determining the right to have it entertained*. Titus vs. Latimer, 5 Tex. 433.

"To fix any given mode for an appeal is but to prescribe a regulation by means of which jurisdiction to hear the appeal may be acquired. To vest in the appellate court itself, or in some other authority, *a discretionary power of deciding whether the appeal shall lie*, is equally only a regulation of the manner in which the appeal is to be taken. * * *

"The Legislature inaugurated the writ of error practice as the method whereby the appellate jurisdiction of the Supreme Court might be acquired. *It also lodged in the Supreme Court the authority of determining the merits of the grounds advanced for the issuance of the writ and, hence, when it should be allowed.*" (Italics ours.)

The procedure upon petition for writ of error is found in Articles 1739, 1740 and 1742, R. C. S., viz:

Article 1739:

"The Supreme Court MAY review final judgments of Courts of Civil Appeals upon writ of error, when good cause therefor be shown by application for such writ, as hereinafter required, the sufficiency of such cause to be determined as herein provided."

Article 1740:

"A writ of error before the Supreme Court may be applied for by petition addressed to said Court, stating the nature of the case and the grounds upon which the writ of error is prayed for, and showing that the Supreme Court has jurisdiction thereof; and the petition shall contain such other requisites as may be prescribed by the Supreme Court."

Article 1742:

"The petition shall be filed with the clerk of the Court of Civil Appeals within thirty days from the overruling of the motion for rehearing."

The petition for writ of error was filed with the Clerk of the Court of Civil Appeals the 11th day of November, 1929

(R. 55-56), and in the Supreme Court the 14th day of November, 1929, in obedience to Article 1883. Said petition for writ of error urged the invalidity of the Statute in question because of the Federal Constitutional claim asserted, and assigned as error the action of the Court of Civil Appeals in sustaining its validity. (R. 51-55.)

The Court of Civil Appeals expressly held that a decision as to the constitutionality of the statute was necessary to "a correct disposition of the appeal." (R. 28.)

The petition for writ of error was dismissed for want of jurisdiction December 11, 1929. The effect of that order is indicated by Article 1750, viz:

> "* * * The refusal or dismissal of an application shall have the effect of denying the admission of the cause into the Supreme Court."

Article 1762 provides that:

> "A motion for rehearing may be filed with the Clerk of the Court (Supreme Court) within fifteen days after the date of the entry of the judgment or decision, and not later."

A motion for rehearing, again urging upon the Supreme Court the Federal question here involved, was filed within fifteen days after December 11, 1929, to-wit, on December 21, 1929 (R. 59-61), and on January 22, 1930, that motion was overruled (R. 63). Second or additional motions for rehearing are not provided for in the State Supreme Court.

It is thus seen that the case falls within that class of which appellate jurisdiction is given to the State Supreme Court and that the order of that Court dismissing the petition for writ of error as for want of jurisdiction simply

evidences its refusal to exercise the discretionary jurisdiction conferred upon it.

Appellants understand this Court to hold that a review will never be granted here until the complaining party has exhausted every remedy and procedure looking to a review by the highest court of the State; and that it is immaterial that the precise question urged had been previously decided by the highest court of the State in another case.

Mathews vs. Huve, 269 U. S., 262; 70 L. Ed. 266.

And having thus exhausted the State procedure in seeking a reversal of the judgment below and having failed to secure a review by the Supreme Court of Texas, the Court of Civil Appeals is the highest Court of Texas in which a decision of this cause could be had; and the appeal properly runs from that court to the United States Supreme Court.

Bacon et al vs. State of Texas, 163 U. S. 207; 41 L. Ed. 132.

Sullivan vs. State of Texas, 207 U. S. 416; 52 L. Ed. 274.

St. Louis, San Francisco & Texas Ry. Co. vs. Maude Seale, 229 U. S. 156; 57 L. Ed. 1129;

Western Union Telegraph Co. vs. Crovo, 220 U. S., 264; 55 L. Ed. 498;

Norfolk & Southern Turnpike Co. vs. Virginia, 225 U. S., 264; 56 L. Ed. 1082;

American Ry. Express Co. vs. Levee, 263 U. S. 19; 68 L. Ed. 140.

And the time for perfecting this appeal runs from January 22, 1930, when the State Supreme Court overruled the motion for rehearing on petition for writ of error.

Andrews vs. Railway Co., 248 U. S. 272; 63 L. Ed. 236;

Section 8 (a) of the Act of Congress of February 13, 1925, (43 St. L. 936; U. S. Code, Title 28, Sec. 350);

Robertson—Appellate Practice and Procedure in the Supreme Court of the United States, P. 4, Sec. 4;

T. P. Ry. Co. vs. Murphy, 111 U. S. 488; 28 L. Ed. 492;

Northern Pac. Co. vs. Holmes, 155 U. S. 137; 39 L. Ed. 99;

C. & G. W. R. R. Co. vs. Basham, 249 U. S. 164; 63 L. Ed. 534;

Citizens Bank of Michigan City vs. Opperman, 249 U. S. 448; 63 L. Ed. 701.

V.

STATEMENT DISCLOSING SUBSTANTIAL NATURE OF THE FEDERAL QUESTION PRESENTED

Bain Peanut Company, a private corporation under the laws of Texas, is a citizen of the United States and of the State of Texas under the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Power Manufacturing Company vs. Saunders, 274 U. S. 490; 71 L. Ed. 1165.

The right of a citizen to be sued in the county of his residence is recognized as a valuable right under the Texas decisions, viz:

> "It has been held that the privilege to be sued in the County of one's residence is a valuable right."

Christensen v. Foster, ...Tex. Civ. App. .....; 297 S. W. 657, writ of error denied by State Supreme Court.

A state statute which arbitrarily discriminates against certain classes of citizens is within the reach of the equal protection clause of the Fourteenth Amendment even though merely procedural in nature.

Power Manufacturing Company vs. Saunders, 274 U. S. at 490; 71 L. Ed. 1165.
Truax vs. Corrigan, 257 U. S. 312; 66 L. Ed. 254.

The Supreme Court of Texas, in *Grayburg Oil Company vs. Powell*, ...Texas, ..., 15 S. W. (2d) 542, says:

"Our Statute, Subdivision 23 of Article 1995, R. C. S., * * * covers by its terms all private corporations, associations, or joint stock companies, be they foreign or domestic."

The Austin Court of Civil Appeals in *Dublin Mill & Elevator Company vs. Cornelius*, Tex. Civil App. , 5 S. W. (2d) 1027, states:

"Article 1995 provides as a general rule of venue that no person who is an inhabitant of this state shall be sued out of the county of his residence or domicile, except in certain specified instances not involved here. *There is no exception which permits an individual citizen of Texas to be sued in any county in which a cause of action or a part thereof arises*, but subdivision 23 of the article referred to does provide that 'suits against a private corporation, * * * may be brought in any county in which the cause of action, or a part thereof, arose.'" (Italics ours.)

Therefore the discrimination, which clearly exists, favors individuals, as a class, against all private corpora-

tions, associations or joint stock companies, as a class. The United States Supreme Court in *Power Mfg. Co. vs. Saunders*, 274 U. S. 490; 71 L. Ed. 1165, holds that a discrimination with respect to venue of transitory actions in favor of domestic corporations and individuals, as a class, and against foreign corporations, as a class, "is not theoretical merely, but real and substantial." It is thus seen that the Federal Constitutional question urged on this appeal involves a valuable right of a citizen of the United States, and is of a substantial nature; the sole question to be determined being whether the discrimination between foreign corporations, as a class, and domestic corporations and individuals, as another class, so condemned by the United States Supreme Court is to be held a valid classification as between individual citizens of a state on the one hand and corporations, both domestic and foreign, on the other hand. As bearing also upon the substantial character of the Federal question urged on this appeal, appellants submit the following authorities in support of their contention that Section 23, Article 1995, R. C. S., of Texas is invalid because in conflict with the equal protection clause of the Fourteenth Amendment to the United States Constitution:

Frost vs. Corporation Commission of Oklahoma et al, 278 U. S. 515; 73 L. Ed. 483.

Kentucky Finance Co. vs. Paramount Auto Exchange Co., 262 U. S. 544; 67 L. Ed. 1112.

Liggett Co. vs. Baldridge, 278 U. S. 105; 73 L. Ed. 204.

Power Mfg. Co. vs. Saunders, 274 U. S. 490; 71 L. Ed. 1165.

Quaker City Cab Co. vs. Pennsylvania, 277 U. S. 389; 72 L. Ed. 927.

VI.

FEDERAL STATUTES UNDER WHICH JURISDICTION IS ASSERTED

Appellants therefore submit that this case is one in which a review could have been had in the Supreme Court of the United States upon writ of error under Section 237 of the United States Judicial Code under the Legislation in force when the Act of January 1, 1928, abolishing the writ of error, was passed; and that the United States Supreme Court has jurisdiction to review and reverse the judgment below under Subdivision (a), Section 237, United States Judicial Code, as amended February 13, 1925, because the judgment complained of is the judgment of the highest court of the State of Texas in which a decision could be had herein, where was drawn in question the validity of a statute of the State of Texas on the ground of its being repugnant to the Constitution of the United States, the decision of the State Court being in favor of its validity; and that the United States Supreme Court has jurisdiction to review and reverse the case under Subdivision (b), Section 237, United States Judicial Code, because the judgment complained of is the final judgment of the highest court of the State of Texas in which a decision could be had, where was drawn in question the validity of a statute of the State of Texas on the ground of its being repugnant to the Constitution of the United States and in which the Federal claim was denied.

VII.

PRAYER

Respectfully submitted with the prayer that the United States Supreme Court do exercise its jurisdiction to review the judgment of the court below, and that on final hearing said judgment be reversed and rendered for said appellants.

B. L. Agerton

Counsel for Appellants.

APPENDIX

TITLE 42, REVISED CIVIL STATUTES OF THE STATE OF EXAS

COURTS—PRACTICE IN DISTRICT AND COUNTY

CHAPTER ONE

4—VENUE

Art. 1995. No person who is an inhabitant of this State shall be sued out of the county in which he has his domicile except in the following cases:

1. Married women.—A married woman may be sued in the county in which her husband has his domicile.

2. Transient persons.—A transient person may be sued in any county in which he may be found.

3. Non-residents; residence unknown.—If one or all of several defendants reside without the State or if their residence is unknown, suit may be brought in the county in which the plaintiff resides.

4. Defendants in different counties.—If two or more defendants reside in different counties, suit may be brought in any county where one of the defendants resides. The transfer or assignment of a note or chose in action shall not entitle any subsequent holder to sue thereon in any other county than that in which such suit could have been prosecuted if no assignment or transfer had been made.

5. Contract in writing.—If a person has contracted in writing to perform an obligation in a particular county,

suit may be brought either in such county or where the defendant has his domicile.

6. Executors, administrators, etc.—If the suit is against an executor, administrator or guardian, as such, to establish a money demand against the estate which he represents, the suit may be brought in the county in which such estate is administered.

7. Fraud and Defalcation.—In all cases of fraud, and in all cases of defalcation by public officers, suit may be brought in the county where the fraud was committed or where the defalcation occurred, or any of such suits may be brought where the defendant has his domicile.

8. Attachment, sequestration, etc.—A suit for damages resulting from the suing out of a writ of attachment or sequestration, or for levying any such writ, may be brought in the county from which such writ was issued, or in any county where such levy was made in whole or in part.

9. Crime or trespass.—A suit based upon a crime, offense, or trespass may be brought in the county where such crime, offense, or trespass was committed, or in the county where the defendant has his domicile.

10. Personal property.—Suit for the recovery of personal property may be brought in any county where the property may be or where the defendant resides.

11. Inheritances.—If the defendant has inherited an estate concerning which the suit is commenced, suit may be brought in the county where such estate principally lies.

12. Lien.—A suit for the foreclosure of a mortgage or other lien may be brought in the county where the property or any part thereof subject to such lien is situated.

13. Partition.—Suits for the partition of land or other property may be brought in the county where such land or other property, or part thereof, may be, or in the county in which one or more of the defendants reside, or in the county of the residence of any defendant who may assert an adverse claim to or interest in such property, or seeks to recover the title to the same. Nothing herein shall be construed to fix venue of a suit to recover the title to land.

14. Lands.—Suits for the recovery of lands or damages thereto, or to remove incumbrances upon the title to land, or to prevent or stay waste on lands, must be brought in which the land, or a part thereof, may lie.

15. Breach of warranty.—Suits for breach of warranty of title to lands may be brought in any county where either vendor resides, and all other vendors may be joined in the same suit.

16. Divorce.—Suits for divorce shall be brought in the county in which the plaintiff shall have resided for six months next preceding the bringing of the suit.

17. Injunctions.—Suits to enjoin the execution of a judgment or to stay proceedings in any suit shall be brought in the county in which such judgment was rendered or in which such suit is pending.

18. Revision of probate.—Suits to revise the proceedings of the county court in matters of probate must be brought in the district court of the county in which such proceedings were had.

19. Suits against counties.—Suits against a county shall be brought within such county.

20. Heads of departments.—Suits for mandamus against the head of any department of the State Government shall be brought in Travis County.

21. Corporations: charters.—Suits brought by the State for the purpose of forfeiting the charter of a private corporation chartered by Act of the Legislature, or organized under the laws of this State, and for the purpose of canceling the permit authorizing a foreign corporation to transact business in this State, and for the purpose of restraining corporations from exercising powers not conferred upon them by the laws of this State, and for the purpose of preventing persons from engaging in business in this State contrary to the laws thereof, may be brought in Travis County.

22. Railway lands.—Suits on behalf of the State to forfeit land fraudulently or colorably alienated by railway companies in fraud of the rights of the State, under the laws granting lands to railway companies, shall be brought in Travis County.

23. Corporations and associations.—Suits against a private corporation, association or joint stock company may be brought in any county in which the cause of action, or a part thereof, arose, or in which such corporation, association or company has an agency or representative, or in which its principal office is situated. Suits against a railroad corporation, or against any assignee, trustee or receiver operating its railway, may also be brought in any county through or into which the railroad of such corporation extends or is operated. Suits against receivers of persons and corporations may also be brought as otherwise provided by law.

24. Carriers.—Suits arising from damage or loss to any passenger, freight, baggage or other property, by reason of its transportation, or contract in relation thereto, in whole or in part by one or more common carriers or the assignees, lessees, trustees or receivers thereof, operating or doing business as such in this State, or having agents or representatives in this State, may be brought against one or more of those so doing business, in any county where either does business or has an agent or representative.

25. Railway personal injuries.—Suits against railroad corporations, or against any assignee, trustee or receiver operating any railway in this State, for damages arising from personal injuries, resulting in death or otherwise, shall be brought either in the county in which the injury occurred, or in the county in which the plaintiff resided at the time of the injury. If the defendant railroad corporation does not run or operate its railway in, or through, the county in which the plaintiff resided at the time of the injury, and has no agent in said county, then said suit shall be brought either in the county in which the injury occurred, or in the county nearest that in which the plaintiff resided at the time of the injury, in which the defendant corporation runs or operates its road, or has an agent. If the plaintiff is a non-resident of this State, then such suit may be brought in any county in which the defendant corporation may run or operate its railroad, or have an agent. When an injury occurs within one-half mile from the boundary line dividing two counties, suit may be brought in either of said counties.

26. Railroad wages.—Suits by mechanics, laborers and operatives for their wages due by railroad companies, may

be instituted and prosecuted in any county in this State where such labor was performed, or in which the cause of action, or part thereof, accrued, or in the county in which the principal office of such railroad company is situated.

27. Foreign corporation.—Foreign corporations, private or public, joint stock companies or associations, not incorporated by the laws of this State, and doing business within this State, may be sued in any county where the cause of action or a part thereof accrued, or in any county where such company may have an agency or representative, or in the county in which the principal office of such company may be situated; or, when the defendant corporation has no agent or representative in this State, then in the county where the plaintiffs or either of them reside.

28. Insurance.—Suits against fire, marine or inland insurance companies may also be commenced in any county in which the insured property was situated. Suits on policies may be brought against any life insurance company, or accident insurance company, or life and accident, or health and accident, or life, health and accident insurance company, in the county where the home office of such company is located, or in the county where loss has occurred or where the policyholder or beneficiary instituting such suit resides.

29. Libel or slander.—A suit for damages for libel or slander shall be brought, and can only be maintained, in the county in which the plantiff resided at the time of the accrual of the cause of action, or in the county where the defendant resided at the time of filing suit, or in the county of the residence of defendants, or any of them, or the dom-

icile of any corporate defendant, at the election of the plaintiff.

29a. Two or more defendants.—Whenever there are two or more defendants in any suit brought in any county in this State and such suit is lawfully maintainable therein under the provisions of Article 1995 as to any of such defendants, then such suit may be maintained in such county against any and all necessary parties thereto.

30. Special venue.—Whenever in any law authorizing or regulating any particular character of action, the venue is expressly prescribed, the suit shall be commenced in the county to which jurisdiction may be so expressly given.

FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

BASIC PRODUCTS CORPORATION,

Appellant,

vs.

DAVID PATTON AND C. B. [illegible],

Appellees.

Appeal from the Court of [illegible]

APPELLANT'S [illegible] BRIEF IN OPPOSITION

[illegible]

No. 669

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

BAIN PEANUT COMPANY OF TEXAS, ET AL, *Appellants*,

vs.

DAVE PINSON AND C. B. GUYGER, *Appellees*.

Appeal from the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas

APPELLANTS' REPLY TO APPELLEES' MOTION TO DISMISS APPEAL

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Appellees' motion to dismiss this appeal rests upon one ground only, and that ground is *dehors* the record before the Court. They contend that the petition for writ of error from the State Supreme Court to the Court of Civil Appeals should have been filed within 30 days after July 12, 1929; that failure to do so deprived the State Supreme Court of actual jurisdiction, and that its action in dismissing said petition as for want of jurisdiction evidenced its actual want of jurisdiction instead of its refusal to as-

sume its actual and potential jurisdiction to review the judgment of the Court of Civil Appeals. Four Texas Supreme Court cases are cited in support of that contention, viz:

Vinson v. Carter, 166 S. W. 363;
Henningsmeyer v. Bank, 195 S. W. 1137;
Smith v. Patton, 241 S. W. 113;
National Compress Co. v. Hamlin, 269 S. W. 1024.

As applied to the facts involved in those cases the decisions are each correct. But a different rule applies to this case. In the first case cited the original motion for rehearing was not filed in time. A motion for leave to file as of time was overruled. A second motion of the same nature was thereupon filed and overruled. The petition for writ of error was filed within 30 days after the order overruling the second motion, but more than 30 days after the order overruling the first. The original judgment and opinion were never modified. The Supreme Court treated the first order overruling the motion to file as of time as an order overruling the motion for rehearing and concluded that the 30 days time within which to file a petition for writ of error commenced running as of the date of that order. In the second case the first motion was overruled February 14, 1917, but attorneys for the moving party were not advised of that action until more than 30 days had expired. An exact copy of the original motion was again filed, to which was added only a statement as to the failure of the clerk to notify attorneys for movants of the courts' action on the original motion, and of their want of notice of its action until more than 30 days had elapsed. The Court of Civil Appeals there-

upon set aside its order overruling the first motion, and by the same order overruled the second motion. A petition for writ of error was filed within 30 days after the date of the second order. On motion the State Supreme Court dismissed the petition for writ of error, treating the last order as a mere subterfuge by the Court of Civil Appeals to extend the time within which movants might petition the Supreme Court for writ of error, saying:

> "There is nothing in this record which even remotely suggests that the order that set aside the former order, overruling the original motion, was for any other purpose than to permit the filing of the petition for writ of error as within the time required by law, in accordance with the appellants' request."

The original judgment was never modified or withdrawn In the case of *Smith v. Patton* there was no modification of the original judgment or opinion. The first motion for rehearing was overruled, and a motion was filed in the Court of Civil Appeals asking for permission to file a second motion for rehearing. While the latter motion was pending, but within 30 days after the order overruling the original motion, a petition for writ of error was filed in the Court of Civil Appeals. The State Supreme Court denied a motion to dismiss the petition for writ of error on the ground that the prayer for leave to file a second motion was addressed to the discretion of the Court of Civil Appeals and did not suspend its judgment or prevent the jurisdiction of the Supreme Court from attaching when the petition for writ of error was filed in time.

In the case of *National Compress Co. v. Hamlin*, the original motion for rehearing, filed within time, was overruled February 28, 1924. Written opinion on motion for

rehearing was filed March 6, 1924. On March 13, 1924, a motion was filed to certify the case to the State Supreme Court and that motion was overruled April 17, 1924; and on the same day Chief Justice Pleasants filed an opinion "correcting one paragraph of his opinion on rehearing, *but continuing no new ruling against plaintiffs in error.*" (Italics ours.) A second motion for rehearing was filed April 21, 1924, and overruled May 1, 1924; and on May 5, 1924, petition for writ of error was filed in the Court of Civil Appeals. We here quote from the language of Mr. Justice Greenwood:

> "When plaintiffs in error allowed 30 days to elapse from, not only the date of overruling their motion for rehearing, but from the date of filing of the opinion of Chief Justice Pleasants of March 6, 1924, the time had passed to invoke the appellate jurisdiction of this court to review the order refusing to grant the rehearing or any ruling embodied in Chief Justice Pleasants' opinion. *Had the Court of Civil Appeals rendered any decision against plaintiffs in error on April 17, 1924, or at any other time within 30 days before they filed their petition for writ of error, of a nature subject to review by this court, a different question would be presented.* This case is one where plaintiffs in error simply seek to use a second motion for rehearing as a means to secure an extension of time to complain of rulings made, *not on such second motion, but on a previous motion for rehearing.* A second motion cannot be used to accomplish any such end." (Italics ours.)

It will thus be seen that the first three cases cited have no application to the situation before this Court. The last case, instead of supporting appellees' contention, clearly supports that of appellants. That this is true will

be readily seen by referring to the opinion of Judge Leslie (R. 69), wherein it is stated:

> "On original hearing, the majority reformed the judgment of the trial court so as to exclude all items of recovery, except the actual purchase price paid by appellees for the peanuts. Both parties have filed motions for rehearing, the appellant insisting that the judgment of the trial court be reversed and remanded on account of the insufficiency of the evidence to support any recovery, and the appellees insisting that the judgment of the trial court be in all things affirmed. Appellant's motion for rehearing will be overruled."
>
> * * * * *
>
> "The judgment heretofore entered by this court, reforming the judgment of the trial court, and affirming same as reformed, is set aside and the original opinion withdrawn, and, in lieu thereof, judgment will be here entered in all things affirming the judgment of the trial court, and this opinion will be substituted for the original."

Article 1877, R. C. S. provides:

> "Any party desiring a rehearing of any matter determined by any Court of Civil Appeals, may, within fifteen days after the date of entry of the judgment or decision file with the Clerk of said court his motion for rehearing thereof, in which the ground relied upon for the rehearing shall be distinctly specified," etc.

The judgment and opinion complained of in the motion for rehearing filed July 12, 1929, (R-49) were therefore the only judgment and opinion of the Court of Civil Appeals, it having completely vacated, withdrawn and annulled its judgment and opinion of May 3, 1929; and the

motion for rehearing was filed within 15 days after the entry of the last and only existing judgment of that Court.

The State Supreme Court in the case of *Knox v. McElroy*, 103 Tex. 357; 127 S. W. 798, expressly held that a second motion for rehearing, followed by order of the Court of Civil Appeals overruling same, was not only proper but necessary before the State Supreme Court could take jurisdiction on petition for writ of error. In that case the Court of Civil Appeals struck out the statement of facts and thus affirmed the case on original hearing. Motion for rehearing was filed, the statement of facts reinstated and considered, the case was decided on its merits and affirmed. No motion for rehearing was filed to the second affirmance. The Supreme Court said:

> "In an ordinary case the rules of this Court require that as a prerequisite to the consideration of the assignments a motion for rehearing should be filed in the Court of Civil Appeals."

Plaintiff in error urged the Supreme Court to consider fundamental error. In that connection the Supreme Court further said:

> "But in this connection we may remark that we are not inclined to hold that if fundamental error is shown, it could be taken advantage of in this court, *without raising it in a motion for a rehearing in the Court of Civil Appeals.*" (Italics ours.)

In *Roth v. Murray*, 105 Tex. 6, 141 S. W. 515, the State Supreme Court issued a writ of mandamus to require the Clerk of the Court of Civil Appeals to file a petition for writ of error in that Court tendered more than 30 days after the original motion for rehearing was overruled but

within 30 days after a second motion was overruled. The opinion discloses that:

> "The second opinion, which decided the case on its merits, related to and adjudged wholly different questions. The second motion for rehearing, complained of and assigned error in respect to all the several matters discussed and decided in the second opinion."

In that case there was no difference between the original judgment and the judgment on original motion for rehearing. Each being an affirmance of the judgment of the trial court; but the opinions on original hearing and on first motion for rehearing were different. That circumstance as decided by the State Supreme Court, not only justified but required the complaining party to file second motion for rehearing as a prerequisite to the appellate jurisdiction of the Supreme Court.

Again, in the case of *United States Fidelity & Guaranty Company v. Henderson County*, 276 S. W., 203 (Sections 14 and 15. at page 209), the Commission of Appeals of Texas, with approval of the State Supreme Court, speaking upon this subject said:

> "The remaining assignments by the interveners all relate to the action of the Court of Civil Appeals in overruling various cross-assignments of error presented by the interveners. On the original hearing the Court of Civil Appeals sustained these cross-assignments, and only on a rehearing did that court make its order overruling them. No motion for rehearing was made in the Court of Civil Appeals by the interveners, and in this state of the record we are without authority to consider the matters complained of. It is well settled generally that the Supreme Court will not consider errors not properly assigned

in the motion for rehearing in the Court of Civil Appeals, and express application of this rule has been made where the supposed error was committed, not upon the original hearing, but upon a rehearing in the Court of Civil Appeals. *The motion for rehearing to form the basis for a consideration in the Supreme Court must be predicated upon the judgment of the Court of Civil Appeals actually deciding the matters complained of.* In Roth v. Murray, 105 Tex. 6, 141 S. W. 515, Mr. Justice Ramsey for the Supreme Court said: * * *

"This decision and the one cited (Knox v. McElroy, 103 Tex. 357, 127 S. W. 798) are conclusive against our authority to consider the question presented." (Italics ours.)

Regardless of anything else, the second motion for rehearing in the Court of Civil Appeals was addressed to *"the judgment of the Court of Civil Appeals actually deciding the matters complained of."* The record discloses that on July 12, 1929, the former judgment and opinion were withdrawn and the judgment and opinion of that date substituted, thus making it necessary to address the motion for rehearing thereto, there being no other judgment or opinion available for that purpose.

In the case at bar there was a material difference between both the original and substituted judgment and the original and substituted opinion, as is clearly disclosed by portions of the majority opinion hereinabove quoted at page 5. Copies of the original opinion and judgment of the Court so withdrawn and therefore annulled by the Court of Civil Appeals are set out in the Appendix hereto and certified copies thereof are submitted and tendered herewith for verification. It will be seen from the original majority opinion that the Court of Civil Appeals regarded

the former adjudication of this case by the Commission of Appeals as excluding appellees' right to recover anything except the difference between the purchase price and the sale price of the peanuts. The District Court judgment, (R. 19), was for $6805.40. The original judgment of the Court of Civil Appeals, (Appendix 1), was for $5759.21—a difference of $1046.19. That difference consisted, besides costs, of the following items:

Money paid out for drayage	$ 46.10
Insurance premiums	178.89
Commission	698.10
Interest	123.10
Total	$1046.19

(Par. 6 plaintiffs' originial petition R. 2—; original judgment and op. Ct. Civ. App., Appendix.)

It is thus seen that not only was the original judgment modified in a material particular, and the substituted judgment of July 12 made more burdensome upon appellants to the extent of $1046.19; but a different construction was placed upon the contract involved in the two opinions, the construction placed thereon in the latter opinion resulting in the more burdensome judgment just indicated. Hence obviously the two cases last cited by appellants apply, as does the quotation at page 4 hereof from the case of *National Compress Co. v. Hamlin*. The second motion for rehearing in the Court of Civil Appeals was not a mere pretext to secure an extension of the time in which to complain of the ruling made, and thus extend the time in which to petition the State Supreme Court for writ of error; but it was a motion addressed to a new and different judgment and opinion of the Court involving a

more burdensome judgment and more burdensome construction of the contract involved, and lastly, it was a motion for rehearing addressed to the only judgment of the Court of Civil Appeals then and now in existence.

Appellees advert to the further fact that there was a dissenting opinion in the Court of Civil Appeals by Associate Justice Funderburk, and that such dissent would have conferred jurisdiction upon the State Supreme Court. From that circumstance it is argued that the action of the State Supreme Court in dismissing appellants' petition for writ of error as for want of jurisdiction indicates its decision that it was without actual jurisdiction to review the case because of the failure of Bain Peanut Company to file such petition in the Court of Civil Appeals within 30 days after July 12, 1929. The conclusion reached is obviously unsound. The judgment of the Court of Civil Appeals is not one of the class of judgments made final in the Court of Civil Appeals by statute; and it is true that the dissenting opinion by Judge Funderburk involving a question of law material to the decision raised a jurisdictional issue upon which the Supreme Court might have granted a review. It is also true, *dehors* the record, that Bain Peanut Company's petition for writ of error advanced the existence of the circumstance mentioned as one of the grounds why the Supreme Court of Texas should take jurisdiction. Appellees, at page 8 of the counter statement, impliedly admit that all possible jurisdictional matters were urged upon the State Supreme Court in Bain Peanut Company's petition for writ of error, because they say:

> "It seems to us that beyond question had Appellant properly invoked the jurisdiction of the State Su-

preme Court, by complying with the local practice act, it would have secured a hearing of the case."

The only alleged failure to comply with the local practice act with which appellees charge appellants consists in Bain Peanut Company's failure to file the petition for writ of error in the Court of Civil Appeals within 30 days after July 12, 1929. Had appellees' attorneys thought Bain Peanut Company derelict in any other matter of State procedure, we surmise they would have mentioned it.

The Court of Civil Appeals (R 69) disposed of the appeal primarily under an application of the doctrine of the law of the case. That Court held that it was precluded from re-examining the several issues presented, excepting the Federal question here presented, by the action of the State Supreme Court (Commission of Appeals), in ruling against Bain Peanut Company on those same questions on the former appeal. In appellants' original statement in support of jurisdiction we have referred to authorities disclosing the fact that the jurisdiction of the State Supreme Court is discretionary, and that it has authority to deny a review of a case within its potential jurisdiction, and properly presented, when, in its discretion such review should be denied. The opinion of the Court of Civil Appeals is reported in 19 S. W. (2nd), 203 to 207. That was the second appeal involving the merits of the case. The Commission of Appeals of Texas on former appeal, 292 S. W. 203, affirmed the case and ruled adversely to Bain Peanut Company on practically the precise questions decided by the Court of Civil Appeals below, excluding the Federal question involved on this appeal. On motion for rehearing, 294 S. W. 536, the Commission of Appeals reversed the case on one question not involved in

the last appeal. While this case was pending in the Court of Civil Appeals on the last appeal the State Supreme Court in *Grayburg Oil Comany v. Powell*, 15 S. W. (2nd) 542, sustained the validity of the section of our venue act involved in this appeal against the precise constitutional objection here urged; and the Court of Civil Appeals, following that decision, ruled against Bain Peanut Company upon that question on the last appeal. It is thus seen that when the petition for writ of error was presented to the State Supreme Court, it had previously determined, in one way or another, every question presented to it by that petition. It is true, as stated by appellees, that the State Supreme Court rarely indicates the ground upon which it denies or dismisses a petition for writ of error. It is equally true, as we have shown, that the case falls within the potential jurisdiction of the State Supreme Court and that all procedural steps looking to a review by it were followed in a timely and proper manner. Therefore, it seems unquestionable that the action of the State Supreme Court in dismissing Bain Peanut Company's petition for writ of error as for want of jurisdiction must be referred to Section 2 of Article 1728 Revised Civil Statutes 1925, as amended by Chapter 44 of the Acts of the Fortieth Legislature in 1927, viz:

> "In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court shall refuse the application; *in all cases where the judgment of the Court of Civil Appeals is a correct one, but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall dismiss the case for want of jurisdiction.*" (Italics ours.)

Appellants, therefore, assert that the dismissal of Bain Peanut Company's petition for writ of error as for want of jurisdiction evidenced nothing more than the Supreme Court's refusal to exercise the discretionary jurisdiction to review the case.

Argumentatively, appellants suggest that had the contention now advanced by appellees for dismissal been advanced before the State Supreme Court they could have had their motion brought up in the present record by counter praecipe. That was not done. And if any such motion was made in the Supreme Court of Texas, appellants were never advised thereof and never had an opportunity to oppose it. Our Supreme Court rules require that appellants should have been furnished with a copy and notice of filing of all motions; and it is therefore asserted with confidence that no such motion or suggestion as appellees now present was ever presented to or considered by the State Supreme Court.

Appellants realize that practically everything stated by Appellees in their counter statement is outside the record before this Court; but they have felt that it is but fair to the Court and to themselves that the Court should be fully advised, and have accordingly attempted so to advise the Court.

Respectfully submitted with prayer that Appellee's motion to dismiss be denied.

B. L. Agerton

Counsel for Appellants.

BRYAN, STONE, WADE & AGERTON,

and

B. G. MANSELL,

Of Counsel.

APPENDIX

—o—

BAIN PEANUT COMPANY OF TEXAS
vs. No. 492
PINSON & GUYGER.

—o—

From the District Court of Comanche County.
May 3, 1929
Opinion by Leslie, Associate Justice.

This cause came on to be heard on the transcript of the record, and the same being inspected, it is the opinion of the Court that there was error in the judgment: It is therefore considered, adjudged and ordered that the judgment of the court below be, and the same is hereby reformed so that appellees, Pinson & Guyger, do have and recover of and from appellant, Bain Peanut Company of Texas, and its surety, United States Fidelity and Guaranty Company, the amount of $5,759.21 (the same including $677.63, the proportional part of the interest included in the judgment below), and as so reformed the judghent of the court below will be affirmed. It is further ordered that Dave Pinson and C. B. Guyger pay all costs incurred by reason of this appeal, for which let execution issue, and that this decision be certified below for observance.

THE STATE OF TEXAS,
COUNTY OF EASTLAND.

I, Dan Childress, Clerk of the Court of Civil Appeals for the Eleventh Supreme Judicial District of the State of Texas, do hereby certify that the above and foregoing

contains a true and correct copy of the original judgment in the above styled and numbered cause entered on the records in my said office on May 3, 1929, and as the same now appears.

Given under my hand and seal of office this 12th day of March, A. D. 1930.

DAN CHILDRESS, Clerk,
By Vera H. Phillips, Deputy.

BAIN PEANUT COMPANY OF TEXAS, *Appellant*,
vs.
PINSON & GUYGER, *Appellees*.

—o—

No. 492

—o—

Appeal From the District Court of Comanche County.

—o—

This is the third appeal of this case. The first was from a judgment on a plea of privilege, the second and third from trials on the merits. The last trial which was before the court and jury resulted in a judgment on special issues in favor of the plaintiff, and the defendant Bain Peanut Company appeals.

The appellees as partners brought this suit against the appellant for damages arising from a breach of an alleged contract which was specifically alleged in paragraph 1 of their petition, as follows:

> "That * * * on or about the first day of November, 1923, the defendant, Bain Peanut Company, acting through and by its duly authorized * * * agent, Bill Huxford, came to plaintiffs at Proctor, Comanche

County, Texas, and entered into a contract with plaintiffs by which it was agreed between the plaintiff's and defendant that the plaintiffs who were dealers in and purchasers of peanuts, would buy peanuts for the defendant on the open market during the peanut season of 1923 and 1924 which was then just beginning, and that plaintiffs would buy peanuts for no other parties. It was agreed that plaintiffs would pay their own money for the peanuts, which were to be purchased at the best price obtainable on the current market from day to day, and would store the said peanuts in a storehouse at Proctor, Texas, agreed on at the time between plaintiffs and defendant. That the said peanuts would be stored in such a manner as to cure and dry properly for shipment to the defendant's central plant or mill at Fort Worth, Tarrant County, Texas, where it was agreed that the peanuts would be shipped as soon as properly cured. That the plaintiffs would pay the storage and insurance on the peanuts while in storage, and drayage to the cars when they should be ready to ship to the defendant, as aforesaid. It was agreed that defendant would reimburse the plaintiffs for the original cost of the peanuts and for their insurance, storage and drayage, and pay the plaintiffs for their services a commission of ten cents on every bushel which they should buy for the defendant."

In subsequent paragraphs of the plaintiffs' petition, estoppel and ratification were pleaded, and further:

"That the plaintiffs, all during the said peanut season, conferred from time to time with the defendant's agent (Huxford) and acted under the direction of the defendant's agent in making the purchases and in storing and handling the peanuts."

It was alleged that under and by virtue of said contract the plaintiffs purchased 6,981 bushels of peanuts of

an aggregate value of $12,455.78, and that after said peanuts had been purchased, insured, stored, cured and handled in every way in accordance with the above mentioned contract, the plaintiffs demanded of the defendant, Bain Peanut Company, that it accept the shipment of peanuts and pay plaintiffs therefor according to the original contract. That the defendant refused to comply with the contract and rejected the peanuts, which were later sold by the plaintiffs for $7,374.20, the best price obtainable. This lawsuit is for the difference between that sum and the amount paid by plaintiffs for the peanuts, together with the sum of $46.10 drayage, $178.89 insurance, and an alleged commission of $698.10, aggregating $6,004.67, an alleged loss proximately resulting to plaintiffs by reason of the defendant's breach of the alleged contract, performable in Comanche County, Texas.

The defendant interposed a plea of privilege to be sued in Tarrant County, Texas, and the subject to this plea entered a general denial, etc.

The proposition on the court's action in overruling the plea of privilege to be sued in Tarrant County arises from the overruling of the defendant's demurrer to the plaintiffs' controverting affidavit. The plaintiffs rested their right to venue in Comanche County upon the ground that the suit was against a private corporation on a cause of action arising in whole or in part in that county. This involved plaintiffs' right to hold venue in that county under subdivision 23, Art. 1995, R. S., which subdivision has recently been held discriminatory against private corporations, and therefore, unconstitutional. See *Dublin Mill & Elevator Company v. Cornelius,* 5 S. W., (2d) 1027; *Houston Light & Power Company v. Jenkins,* 5 S. W., (2d) 1030. However, those cases have recently been

overruled by the Commission of Appeals in the opinion in the case of *Grayburg Oil Company v. N. P. Powell*, approved by the Supreme Court. The point calls for no further consideration and the proposition presented is overruled.

One of the main contentions of the appellant is that the trial court erred in refusing to grant a new trial because of the newly discovered evidence of the witness Chisholm. More than ordinary showing is made in support of this proposition. There is, however, one reason appearing which forces us to the conclusion that the case should not be reversed because of this matter alone. At the time of the former trial appellant had notice that this witness probably knew facts material to the case. When the witness was then asked by appellant's attorney about the matter he did not disclaim any such knowledge, but replied that if he was put on the witness stand he would tell the truth. This statement alone implied some knowledge. Appellant showed no lack of diligence by it failure to place him on the stand at that trial, not knowing what his testimony would be, and the trial being then in progress. Had this occurred at the last trial of the case when there was no time in a legal way to ascertain what he knew without being bound by what he said, we would be inclined to hold that appellant was fully acquitted of any want of diligence; but a year or more intervening between that time and the time the case was finally brought to trial, the appellant had ample opportunity to take the depositions of the witness and compel him to disclose his knowledge of the facts. Appellant having failed to do so, we think we would not be justified in holding that the trial court abused its discretion in refusing a new trial. Particularly do we think we are justified in this holding,

in view of the fact that the witness Chisholm, when later approached, voluntarily made and delivered to appellant an affidavit setting forth the testimony it is claimed he would give on a re-trial of the cause. This proposition is overruled.

The judgment of the court below is challenged on the ground that there was no evidence of any authority on the part of Huxford as agent of the Bain Peanut Company to make the contract in question. The same question was presented on the former appeal and it appears that at the last trial the cause was tried on the same pleading as at the first trial and on substantially the same testimony. (287 S. W., 87.) In discussing the above contentions on the former appeal, this court said:

> "It is not deemed necessary to discuss those assignments in detail. We believe that the record shows express authority in Huxford to act for appellant in so far as such authority is required to sustain the verdict as will be hereinafter more fully shown."

That opinion then proceeds as follows:

> "The charge as a whole was excepted to and a peremptory instruction requested because the evidence introduced had no basis in appellees' pleading. *It is asserted that the plaintiff's petition was based upon an alleged employment of appellees by Huxford as sub-agents for appellant to buy peanuts in unlimited quantities on their own judgment, and that the evidence showed conclusively that Huxford had no such authority.* It is agreed that Huxford did not have authority to employ appellees as sub-agents to buy peanuts for appellant in unlimited quantities on the unrestrained judgment of appellees as to quantities and price, but we do not concur in appellant's claim that such was the case made by the petition. *The petition alleged*

> *specifically that the peanuts were bought from day to day under the immediate direction and control of Huxford. This allegation is a sufficient answer to the contention noted.*" (Italics ours.)

From the above quotation and especially from the last underscored portion thereof, it conclusively appears that this court on the former appeal held that the plaintiff's petition sufficiently alleged a cause of action warranting recovery, at least, of the purchase price paid by Pinson & Guyger, for the peanuts. The evidence supports the conclusion that the peanuts were, in fact, purchased under Huxford's supervision. The fact that the former judgment did not include commissions and other expenses seems to have had an important bearing in determining the conclusions reached by this court upon the former appeal, as is indicated by the above quotations, as well as the following sentence from that opinion:

> "The evidence is deemed sufficient to show express authority on the part of Huxford to make the questioned contract, *particularly in view of the verdict, which allowed a recovery only for the purchase price of the peanuts and excluded any commission or expenses.*" (Italics ours.)

Thus it appears that on the former appeal it was expressly held, that Huxford had authority to make the questioned contract,——at least to the extent of binding his principal to reimburse Pinson & Guyger for the purchase price of the peanuts——and that the pleadings were interpreted as declaring upon such contract and as being a sufficient basis for the recovery of *the sum indicated.* On the former appeal the case reached the Supreme Court, and, upon an opinion by the Commission of Appeals the Supreme Court reversed the judgment of this court

and reformed and affirmed the judgment of the district court. In the Commission's opinion this languauge is used:

> "While there are thirty assignments of error contained in the application, none, other than that raising the question here discussed, presents an error which would require reversal or reformation of the judgment of the trial court." (292 S. W., 203.)

The assignment sustained in that opinion raised a question of the right to recover interest as damages, etc. On motion for rehearing the Commission of Appeals, in its second opinion used this language:

> "In our former opinion in this case we stated that, 'while there are thirty assignments of error contained in the application, *none*, other than that raising the question here discussed, presents an error which would require reversal or reformation of the judgment of the trial court.' 292 S. W., 203. We are now of the opinion that one of the assignments does pesent reversible error." (294 S. W., 536.)

The assignment this time sustained was to the action of the court in admitting hearsay testimony. The judgments of the district court and the Court of Civil Appeals were reversed upon the recommendation of the Commission upon that sole question.

Evidently the Supreme Court, through said opinions by the Commission, approved the interpretation or construction placed on the pleadings by this court on the former appeal, and resolved against the appellant the contention that Huxford had no authority to make with Pinson & Guyger the contract, at least to the extent of reimbursing them for the purchase price of the peanuts. The assignments raising the question of no evidence of any authority

on the part of Huxford as agent of the Bain Peanut Company to make the questioned contract having been considered, (as evidently appears from the last quotations) and overruled, by the Commission, with the approval of the Supreme Court, as well as by this court, and the pleadings remaining unaltered, the testimony admittedly the same, the trial court having followed the former holdings, and the errors working a reversal of the judgment of the trial court on the first trial having been removed, we believe that, in obedience to said opinions, said assignments (again appearing in this record presenting the same contention) should be overruled, and the judgment affirmed, at least to the extent of the recovery for purchase price of the peanuts. In doing so we regard the questions presented by the assignments as no longer open questions in this court, but as being questions which the Supreme Court only, if any court, should reopen.

However, since the former opinions went no further than to allow recovery for the purchase price of the peanuts, and believing that Huxford was not authorized under the record to bind his principal to pay commissions and expenses to appellees, the judgment of the trial court will be reformed so as to permit recovery of the purchase price of the peanuts, as approved in said opinions.

The judgment of the trial court will be reformed and as reformed will be affirmed.

W. P. LESLIE,
Associate Justice.

May 3rd, 1929.

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THE STATE OF TEXAS,
COUNTY OF EASTLAND.

I, Dan Childress, Clerk of the Court of Civil Appeals in and for the Eleventh Supreme Judicial District of Texas, do hereby certify that the above and foregoing is a true and correct copy of the Original opinion handed down by W. P. Leslie, Associate Justice, on May 3rd, A. D. 1929, in the case of Bain Peanut Company of Texas vs. Pinson & Guyger, No. 492, as the same appears now on file in my said office.

Given under my hand and seal of office this 12th day of March, A. D. 1930.

DAN CHILDRESS,
Clerk Court Civil Appeals,
11th Supreme Judicial District of Texas.

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CHARLES ELMORE

No. 49

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

BAIN PEANUT COMPANY OF TEXAS, ET AL.,
Appellants

vs.

DAVE PINSON AND C. B. GUYGER,
Appellees

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLANTS' BRIEF

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SUPREME COURT OF THE UNITED STATES

BAIN PEANUT COMPANY OF TEXAS, ET AL.,
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vs.

DAVE PINSON AND C. B. GUYGER,
Appellees

APPELLANTS' BRIEF

To The Honorable Supreme Court of the United States:

I.

REPORT OF OPINIONS DELIVERED BY THE COURTS BELOW.

The majority and dissenting opinions of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas are published under the style of Bain Peanut Company of Texas vs. Pinson & Guyger in 19 S. W. (2nd) 203. There is no official report of those opinions. The Texas Supreme Court wrote no opinion in declining jurisdiction of the case.

II.

JURISDICTION.

Appellants have complied with paragraph 1 of Rule 12. Appellees have moved to dismiss for want of jurisdiction, and appellants have replied thereto. Further discussion of the Court's jurisdiction is therefore omitted.

III.

STATEMENT OF THE CASE.

Appellees, as plaintiffs, sued Bain Peanut Company of Texas, as defendant, in the District Court of Comanche County, Texas, for damages for breach of contract. Plaintiffs alleged that Bain Peanut Company of Texas was

> "a private corporation duly incorporated and doing business under the laws of the State of Texas, with its principal office and place of business at Fort Worth, in Tarrant County, Texas." (R. 1)

Defandant presented a statutory motion for change of venue to Tarrant County, Texas, designated as a plea of privilege under the Texas practice; and, subject thereto, filed a general demurrer and denial. (R. 3). Plaintiffs controverted the plea of privilege and sought to maintain venue in Comanche County solely upon the allegation that

> "the defendant is a private corporation and this cause of action arose in Comanche County, Texas, and the venue of this suit is properly laid in Com-

anche County, Texas, on account of such facts." (R. 4).

Proof of that allegation brought the case within Subdivision 24, Article 1830, Revised Civil Statutes of Texas (now Subdivision 23, Article 1995, Revised Civil Statutes of Texas), with respect to venue of the suit. The portion of said statute involved in this appeal reads:

> "Suits against a private corporation, association or joint stock company, may be brought in any county in which the cause of action or any part thereof arose."

Defendant demurred generally (R. 6) to plaintiffs' controverting affidavit, which demurrer the trial court overruled, thus denying the change of venue to defendant, and defendant duly excepted, (R. 6-7). Upon a jury verdict, the court rendered judgment against defendant for $6,805.40 with interest from date. (R. 7-8).

By an assignment of error in the trial court (R.8) defendant challenged the constitutionality of the quoted portion of Subdivision 23, Article 1995, Revised Civil Statutes.

Defendant, with United States Fidelity and Guaranty Company as surety on its supersedeas bond, perfected an appeal to the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas. The constitutional question now before the Court was there urged. That Court submitted to the Supreme Court of Texas the following certified question:

"To the Honorable Supreme Court:

"The above cause is pending in this court on submission. Appellant is a private corporation having its principal place of business in Tarrant County. It was sued by appellees in Comanche County. To this suit it filed its plea of privilege to be sued in Tarrant County, the controverting plea of appellees to this plea of privileges sought to hold the venue in Comanche County under Subdivision 24 of Article 1830, R. S., 1911, the statute in force at the time the pleading was filed. This exceptional provision appears in substantially the same form as Subdivision 23, Article 1995, R. S., 1925. No other exceptional provision was relied upon by appellees to maintain venue in Comanche County. A general demurrer to the controverting plea was overruled and the case tried on its merits, resulting in a judgment in favor of appellees against appellant.

"It becomes necessary, for a correct disposition of the appeal, to determine whether the trial court erred in overruling the demurrer to the controverting plea. It was not (fol. 29) claimed in the plea that appellant had an agency or representative in Comanche County, or that its principal office was situated therein, the claim being only that the cause of action, or a part thereof, arose in that county.

"In the recent cases of *Dublin Mill & Elevator Company vs. Cornelius*, 5 S. W. (2d) 1027, and *Houston Lighting & Power Company vs. Jenkins*, 5 S. W. (2d) 1030, the Honorable Court of Civil Appeals for the Third District, at Austin, held that that portion of this exceptional provision authorizing suits against private corporations in any county in which a cause of action or a part thereof arose involved a discrimination between an individual citizen and the private corporation, and was, therefore,

repugnant to the Fourteenth Amendment of the Constitution of the United States, in that it deprives such corporation of the equal protection of the laws as well as protection of equal laws.

"It is our opinion that a question of so frequent application and general importance should be authoritatively determined by the Supreme Court, and we, therefore, deem it advisable to certify to Your Honorable Court for decision the following question:

"Is that provision of Subdivision 23, Article 1995, R. S. 1925, reading as follows: 'Suits against a private corporation, association or joint stock company may be brought in any county in which the cause of action, or a part thereof, arose,' repugnant to the Fourteenth Amendment to the Constitution of the United States?" (R. 9-11).

However, before the foregoing question was answered, the Supreme Court of Texas upheld the validity of the Statute in question, against the very constitutional objection here urged, in the case of *Grayburg Oil Company vs. Powell*, 15 S. W. (2d) 542. Thereupon the Court of Civil Appeals withdrew its certificate upon the express ground of that decision (R. 11); and by majority opinion (R. 13) denied appellants' contention, thus ruling adversely to it on the constitutional question now before the court for decision.

In their Statement in Support of Jurisdiction under Rule 12 appellants have traced every step of procedure below from the decision by the Court of Civil Appeals to the point of perfecting this appeal. Those procedural steps are necessarily involved in discussing the juris-

diction of this Court, to be submitted in connection with the merits. Since they do not bear on the merits, discussion thereof in detail is here omitted. However the invalidity of the statute in question, upon the grounds here presented, was again urged before the Court of Civil Appeals on rehearing by Bain Peanut Company (R. 22); before the Supreme Court of Texas in petition for writ of error and in motion for rehearing thereon (R. 23-25, 27); and was raised by assignment of error and designation of the point upon which appellants now rely for reversal. (R. 31, 33).

IV.

ASSIGNMENT OF ERROR.

Appellants here rely on their only assigned error, namely:

> "The Honorable Court of Civil Appeals erred to the prejudice of appellants in upholding the constitutionality of the following portion of Section 23, Article 1995, Revised Civil Statutes of the State of Texas, to-wit:
>
> > " 'Suits against a private corporation, association or joint stock company may be brought in any county in which the cause of action, or any part there, arose'
>
> (fol. 69) because said statute as upheld and applied in this case arbitrarily discriminates against appellant, Bain Peanut Company of Texas, a private corporation, by subjecting it to suit in a county other than its domicile in this: That individual and other litigants and classes of litigants than those named in said statute are not subject to suit outside of the

counties of their domiciles upon the ground that 'the cause of action, or a part thereof, arose' elsewhere. Wherefore appellants say said statute violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, and, in its application, deprives appellant Bain Peanut Company of Texas of the equal protection of law to which it is entitled under said constitutional provision as a citizen of the United States." (R. 31).

V.

ARGUMENT.

The privilege to be sued in the county of one's domicile has long been recognized by the Texas Courts as a valuable right,

Christenzen vs. Foster, 297 S. W. 657.

And this Court, in *Power Mfg. Co. vs. Saunders*, 274 U. S. 490, 71 L. Ed. 1165, and *Truax vs. Corrigan*, 257 U. S. 312, 66 L. Ed. 254, held state procedural statutes which arbitrarily discriminated against certain classes of citizens to be within the reach of the Fourteenth Amendment.

Under the facts conclusively found by the Court of Civil Appeals in their certified question to the Supreme Court of Texas, (R. 9-11), the right of plaintiffs below to maintain venue of this suit in Comanche County, Texas, must stand or fall with the validity of the challenged portion of Subdivision 23, Article 1995, Revised Civil Statutes of Texas. That Statute is here set out in full, the challenged portion being in italics:

"23. Corporations and associations. — *Suits against a private corporation, association or joint stock company may be brought in any county in which the cause of action, or a part thereof, arose*, or in which such corporation, association or company has an agency or representative, or in which its principal office is situated. Suits against a railroad corporation, or against any assignee, trustee or receiver operating its railway, may also be brought in any county through or into which the railroad of such corporation extends or is operated. Suits against receivers of persons and corporations may also be brought as otherwise provided by law."

The validity of the foregoing statute was first judicially denied in Texas by the Court of Civil Appeals for the Third District in the case of *Dublin Mill & Elevator Company vs. Cornelius*, 5 S. W. (2d) 1027. The opinion in that case argues the invalidity of the statute with such clearness and force that we cannot do better by way of argument than to quote therefrom at length, which we do.

"We have reached the conclusion that the proposition" (challenging the constitutionality of the statute in question) "correctly states the law with regard to the question raised.

"It may be well to again note that the sole and only ground on which appellee sought and maintained venue in Bexar County was that appellant was a private corporation and the cause of action or a part thereof arose in that county. Article 1995 provides as a general rule of venue that no person who is an inhabitant of this state shall be sued out of the county of his residence or domicile, except in certain specified instances not involved here. There is no exception which permits an individual citizen

of Texas to be sued in any county in which a cause of action or a part thereof arose, but subdivision 23 of the article referred to does provide that 'suits against a private corporation, * * * may be brought in any county in which the cause of action, or a part thereof, arose.' So the question to be determined is whether there is any reasonable basis for this discrimination as between an individual and a domestic private corporation with reference to venue for suits on or growing out of their ordinary contracts or torts for damages. We have been unable to find any reasonable basis for this distinction and discrimination. Of course, there may be and are many purposes for which corporations may be reasonably classified and treated differently from individuals, but not so with reference to venue for suits for damages growing out of their respective ordinary contracts or torts. There might also be certain character of contracts of a corporation which would probably furnish a reasonable basis for a distinction as to venue for suit on such contracts; but we have been unable to conceive of any reasonable basis for the classification or distinction made by this statute which applies to all contracts made by any private corporation. It simply authorizes suits against a private corporation in any county in which a cause of action or a part thereof arose on all of its contracts, and at the same time withholds that right with reference to the same character of contracts of an individual. There is no law prohibiting an individual from making the same character of contract made by appellant and involved in this cause. And, generally speaking, the same is true with reference to all contracts which any private corporation may make in this state. So where is the reasonable basis for any discrimination or distinction with reference to venue for suits based upon all such contracts? Appellee

has pointed out no reasonable basis for this distinction or discrimination. Appellant contends that there is no basis for them . And we see no reasonable basis for the Legislature saying to an individual citizen that he does not have to answer for his contracts or torts in any county except that of his domicile, and at the same time saying to a corporate citizen that it must not only answer in the county of its domicile for its contracts or torts, but must also answer for them in any county in which the cause of action or a part thereof arose.

"The constitutionality of this statute as being discriminatory has never been attacked so far as a research of the cases reveals. However, the Supreme Court of the United States, in the recent case of *Power Mfg. Co. vs. Saunders*, 274 U. S. 490-492, 47 S. Ct. 678, 71 L. Ed. 1165, passed upon and held unconstitutional a venue statute which involved a discrimination between a foreign and a domestic corporation, which decision on principle involved and by analogy supports our conclusion that our venue statute, which involves a discrimination between an individual citizen and a private corporate citizen, in the respect pointed out herein, is likewise unconstitutional, as being in violation of the Fourteenth Amendment to the Constitution of the United States, in that it deprives appellant of the equal protection of the laws as well as protection of equal laws. Because we are of the view that the principle involved and the logic of the opinion in Power Mfg. Co. vs. Saunders, supra, apply with equal force to the statute here in question, we quote at length from that opinion as follows:

> "'Thus the statutes were applied as permitting the defendant, a foreign corporation doing business in one county, to be sued in another county, where it did no business and had no office, offi-

cer or agent, on a cause of action which arose n the former. * * *

"'It is conceded that the statutes neither permit a domestic corporation to be sued in a county in which it does no business and has no office, cfficer or agent, nor permit a natural person to be sued in a county in which he does not reside and is not found. * * *

"'We think it very plain that the statutes discriminate against foreign corporations and in favor of domestic corporations and individuals, and that the discrimination is not theoretical merely, but real and substantial.

"'The clause in the Fourteenth Amendment forbidding a state to deny to any person within its jurisdiction the equal protection of the laws is a pledge of the protection of equal laws, * * * and extends as well to corporate as to natural persons. * * * It does not prevent a state from adjusting its legislation to differences in situation or forbid classification in that connection; but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation. * * *

"'No doubt there are subjects as to which corporations admissibly may be classified separately from individuals and accorded different treatment, and also subjects as to which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently. But there are other subjects as to which such a course is not admissible, the distinguishing principle being that classification must rest on differences pertinent to the subject in respect of which the classification is made.

> " 'Here the separate classification of foreign corporations is in respect of the venue or place of bringing transitory actions. * * * So far as their situation has any pertinence to the venue of transitory actions it is not distinguishable from that of domestic corporations and individuals. Certainly there is no substantial difference.'
>
> "It is true that that court was only construing venue statutes involving a discrimination between a foreign and a domestic corporation; still the language used clearly indicates that the court would have held the same with reference to venue statutes involving a discrimination between a foreign or domestic corporation and an individual. At least a careful reading of the opinion will justify the conclusion that the court intended to indicate it would hold all discriminatory venue statutes unconstitutional whether discriminatory as between foreign and domestic corporations, or as between foreign or domestic corporations and individuals."

The Supreme Court of Texas expressly overruled the case just quoted from in *Grayburg Oil Company vs. Powell*, 15 S. W. (2nd) 542, but a comparison of the two opinions clearly discloses that the Court of Civil Appeals has the better of the argument from the standpoint of logic and affirmative reasoning. The Supreme Court of Texas fails to advance an affirmative argument supporting the validity of the statute, but bases its decision solely upon the ground that this Court's opinion in *Power Manufacturing Company vs. Saunders*, 274 U. S. 490, 71 L. Ed. 1165, does not necessarily condemn an attempted discrimination against corporations as a class by striking down the Arkansas venue act which did discriminate against foreign corporations with respect to venue.

While the opinion in the Power Manufacturing-Saunders case confines the *decision* to the effect of an attempted discrimination against foreign corporations by a venue statute which accorded more favorable treatment to domestic corporations and resident individuals, yet we do not believe it was intended thereby to restrict an application of the legal principles there announced to such narrow limits. The Supreme Court of Texas in the Grayburg Oil Co.-Powell case correctly says:

> "Our statute, Subdivision 23 of Article 1995, R. C. S. * * * covers by its terms all private corporations, associations or joint stock companies, be they foreign or domestic." (15 S. W. (2d) 542).

But it fails to point out wherein the privilege of being sued in the county of one's residence is pertinent to the status of an individual citizen, or wherein the burden thereby cast upon private corporations, associations and joint stock companies is pertinent to their status or to any of their inherent characteristics. It advances no reason why those litigants having claims or fancied claims against private corporations, associations or joint stock companies should be preferred over those having similar claims against individual citizens by being accorded more favorable venue of their suits. Nor does our Texas Supreme Court advance—nor do we think any court could have advanced—any justification for the obvious discrimination complained of which can sustain it under the test of permissible classification heretofore often laid down by this court. In short, the attempted classification which now concerns us does not, as it must to be valid, "rest on differences pertinent

to the subject in respect of which the classification is made."

In the case of *Southern Union Life Insurance Company vs. Pesek*, 22 S. W. (2d) 1090, the Court of Civil Appeals at San Antonio, while yielding to the authority of our Supreme Court on the venue question under discussion, vigorously dissented from the soundness of the Supreme Court's conclusions that said statute is a valid enactment. Thus appellant's criticism of our Supreme Court's conclusion appears to rest upon a more solid foundation than the dissatisfaction of a defeated litigant.

We see no escape from the conclusion that the statute in question violates the equal protection clause of the Fourteenth Amendment, according to our understanding of the principles announced in the case of Power Manufacturing Co. vs. Saunders, supra. Our views of that case are fully expressed by the Austin Court of Civil Appeals in Dublin Mill & Elevator Co. vs. Cornelius, supra, and we can add nothng to what is there said.

We cite and shall briefly discuss the following additional authorities:

Kentucky Finance Corp. vs. Paramount Auto Exchange Corp., 262 U. S. 544, 67 L. Ed. 1112.

Quaker City Cab Co. vs. Pennsylvania, 277 U. S. 389, 72 L. Ed. 927.

Liggett Co. vs. Baldridge, 278 U. S. 105, 73 L. Ed. 204.

Frost vs. Corporation Commission of Oklahoma et al., 278 U. S. 515, 73 L. Ed. 483.

Corporation Commission of Oklahoma et al vs. Lowe, ...U. S. ...., 74 L. Ed. 517.

In the first case a Kentucky corporation sued a Wisconsin corporation in replevin for an automobile in the Circuit Court of Milwaukee County, Wisconsin. The defendant filed and the trial court allowed a motion requiring plaintiff to bring into Wisconsin at a place designated in the order all of its corporate books and records pertaining to the transaction. Plaintiff refused to comply and the case was dismissed under the Wisconsin statute. The questioned statute provided that a resident defendant, corporate or individual, could be required to submit to such examination only in the home county regardless of the place of suit; that a non-resident individual could not be required to submit to such examination at all unless personally served within the State, while a foreign corporation was required to submit to such examination in any county in the state fixed by order of court having jurisdiction of the suit. It was primarily upon the discrimination as between *non-resident individuals* and *non-resident corporations* that the statute was held unconstitutional. We quote from the opinion at page 1116:

"No doubt a corporation of one state, seeking relief in the courts of another, must conform to the prevailing modes of proceeding in those courts, and submit to reasonable rules respecting the payment of costs or giving security therefor and the like (see Canadian Northern R. Co. vs. Eggen, 252 U. S.

553, 561, 64 L. Ed. 713, 716, 40 Sup. Ct. Rep. 402); but it cannot be subjected, merely because it is such a corporation, to onerous requirements having no reasonable support in that fact, *and not laid on other suitors in like situations.* Here the statute authorized the imposition, and there was imposed on the plaintiff a highly burdonsome requirement *because of its corporate origin, a requirement which under the statute, could not be laid on an individual suitor in the same situation.* The discrimination was essentially arbitrary. *There could be no reason for requiring a corporate resident of Louisville to send its secretary, papers, files and books to Wilwaukee for the purposes of an adversary examination that would not apply equally to an individual resident of Louisville in a like case.*" (Italics ours.)

The last sentence of the quoted paragraph indicates clearly that the fact that plaintiff was a non-resident corporation was wholly incidental and not material, the test applied in holding the statute invalid being that with respect to venue a corporation and an individual similarly situated must be accorded identical treatment.

In the case of Quaker City Cab Company vs. Pennsylvania, the statute involved laid an occupation tax upon corporations, whether foreign or domestic "owning or operating any device for the transportation of passengers." Incidentally plaintiff in error was a New Jersey corporation doing business in Pennsylvania. It was subject to competition by individuals engaged in the same business; but individuals and unincorporated associations engaged in that business were not subject to the tax; nor were they subject to any similar tax designed to equalize the burden as between such owners

and corporate owners engaged in transporting passengers. The sole basis of discrimination rested in the distinction between individual and corporate ownership. The Court said:

> "The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is *imposed merely because the owner is a corporation*. The discrimination is not justified by any difference in the source of the receipt or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation." (Italics ours).

The distinction on which the discrimination was based was not any supposed difference between a foreign and a domestic corporation or a foreign corporation and resident individual of Pennsylvania but that " the tax is imposed merely because the owner is a corporation."

The case of Liggett Company vs. Baldridge involved a Pennsylvania statute that undertook to limit the operation and ownership of pharmacies or drug stores to individuals, and provided that:

> "No corporation, association or co-partnership shall own a pharmacy or drug store unless all the partners or members thereof are licensed pharmacists."

excepting however corporate and partnership owners of drug stores and pharmacies already in being. Incidentally again, the appellant was a non-resident corpora-

tion, but that circumstance is given no further consideration than to mention it as a fact. All corporations, partnerships and associations whether residents or nonresidents were denied the right to own and operate drug stores or pharmacies; and the question of diversity of citizenship or that the complainant was a foreign corporation doing business in Pennsylvania was not even adverted to in connection with the holding of the court that the statute was unconstitutional. That holding was predicated solely upon the unreasonable and arbitrary discrimination against corporations and in favor of individuals with respect to the operation of a legitimate business.

The two Oklahoma corporation commission cases last cited each involve the same statute, and in each instance the parties were respectively resident citizens and domestic corporations of Oklahoma. In the first one the Oklahoma statute, as construed and applied by the corporation commission, was held to discriminate against individual citizens and in favor of corporations and was therefore adjudged invalid because it violated the equal protection clause of the Fourteenth Amendment. We regard it as significant of the correctness of our estimate of the case of Power Manufacturing Company vs. Saunders that it was cited in support of the proposition that the mere difference between individuals and corporations is not sufficient basis for different classifications resulting in a heavier burden on either. None of the four dissenting Justices excepted to the broad proposition so announced, their several dissents being based on their

views that the character of the corporation involved in the case afforded the proper basis for the classification made by the statute and justified the apparent discrimination arising therefrom. The principles recognized and applid in the first of the Oklahoma Corporation Commission cases were again recognized in the second one cited.

If the several classifications attempted in the cases just discussed violated the equal protection clause of the Fourteenth Amendment, we can discern no basis for sustaining the validity of the portion of our venue act here challenged on the same ground.

Appellants therefore respectfully submit their case and pray that it be reversed with appropriate instructions.

B. F. Logsdon,

Counsel for Appellants.

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No. 49

IN THE

Supreme Court of the United States

BAIN PEANUT COMPANY OF TEXAS, ET AL., Appellants,

vs.

DAVE PINSON AND C. B. GUYGER, Appellees.

Appeal from the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas.

GIB CALLAWAY
Counsel for ~~Appellants~~ Appellees

CALLAWAY & CALLAWAY
Of Counsel.

No. 669

IN THE

Supreme Court of the United States

BAIN PEANUT COMPANY OF TEXAS, ET AL., Appellants,

vs.

DAVE PINSON AND C. B. GUYGER, Appellees.

Appeal from the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas.

STATEMENT CONTESTING THE JURISDICTION OF THIS COURT AND MOTION TO DISMISS APPEAL.

To the Honorable Supreme Court of the United States:

Now comes the Appellees, Dave Pinson and C. B. Guyger, in the above styled and numbered cause, by their counsel of record herein, and move the court to dismiss the appeal in the above entitled cause for want of jurisdiction.

The appellants herein, have not exhausted their remedies provided under the procedure of the State of Texas for relief. The Supreme Court of the State of Texas dismissed the appellants application for writ of error, because the said application was not filed in the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas within 30 days from the overruling of appellants First Motion for Rehearing. The application was properly dismissed by the Supreme Court of Texas for want of jurisdiction, because of such failure to exhaust all remedies, which were open to them to secure a hearing in the Supreme Court of the State of Texas on the question relied on in this appeal.

General Statement of the proceedings below, and the statute applicable thereto, which show from an examination of the face of the record that the applicants did not exhaust all remedies for relief provided under the State Statutes, and that this Court has no jurisdiction on this appeal.

The Jurisdiction of the Supreme Court of

Texas is defined by Article 1728 Revised Statutes 1925, as follows:

"The Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, extending to all questions of law arising in the following cases when same have been brought to the courts of Civil Appeals from final judgment of trial courts:

1. Those in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision.

3. Those involving the construction of the validity of statutes necessary to a determination of the case."

The statutes of the State of Texas, provide (Article 1739-1740 and 1741, R. S. 1925) that before the Supreme Court can review final judgments of the Courts of Civil Appeals a petition addressed to the said Court must be filed with the Clerk of the Court of Civil Appeals, which decided the case within thirty days from the overruling of a Motion for a Rehearing. On

this matter Article 1742, R. S. 1925, reads as follows:

> "The Petition shall be filed with the Clerk of the Court of Civil Appeals within 30-days from the overruling of the Motion for a Rehearing."

The opinion rendered by the Court of Civil Appeals in this case dated July 12th, 1929, shown in the record pp. 34-40, was the opinion rendered on appellants first motion for rehearing. In said opinion, Justice Leslie for the Court uses this language:

> "Appellant's Motion for rehearing will be Overruled." * * * *
>
> "Appellees' Motion for rehearing is, therefore, granted."

It appears therefore that the Court overruled the appellants First Motion for a rehearing theretofore filed, and granted the motion for a rehearing filed by the appellees. This opinion was rendered on July the 12th, 1929, but this opinion made no material change from the original opinion, which was rendered May 3, 1929.

Appellants **Second Motion for a Rehearing** (R. 48-49) was filed on July 27th, 1929. This motion was in all essential particulars like the first. This Motion for Rehearing was overruled by the Court of Civil Appeals on October 18th, 1929 (R. 50). The petition for writ of error to the Supreme Court was filed with the Court of Civil Appeals the 11th day of November, 1929 (R. 55-56) and in the Supreme Court of the State of Texas, on the 14th day of November, 1929.

It will be seen, therefore, that the Court of Civil Appeals rendered its opinion overruling appellants first Motion for a Rehearing on July the 12th, 1929. The appellant did not file its application for a Writ of Error until the 11th of November, 1929, **four months** after the rendition of the opinion by the Court of Civil Appeals overruling the appellants said first Motion for a Rehearing. Article 1742, provides that the petition should have been filed with the Clerk of the Court of Civil Appeals within 30-days from the rendition of the opinion on July the 12th, 1929.

Appellants have not complied, therefore, with the practice of the State of Texas, in this particular, and it is evident from an inspection, of the record that for this omission alone, the Supreme Court of the State of Texas dismissed this case for want of jurisdiction, and not because the Court was without jurisdiction to pass on the case, had this practice act been complied with.

The original opinion rendered by the Court of Civil Appeals in this case and the first motions for a rehearing filed by the appellants and appellees have not been included in the record filed in this Court in this case by the Clerk of the Court of Civil Appeals at Eastland, Texas. But reference to the complete record of this case shows that the Court of Civil Appeals rendered its first opinion on May the 3rd, 1929. The plaintiff in error, The Bain Peanut Company of Texas, filed its original motion for rehearing in the case on the 16th day of May, 1929. This is the Motion overruled by the Court in its opinion rendered July 12th, 1929, from which this appeal is taken. The second motion for a re-

hearing was filed in this Court, as above stated, on July 27th, 1929.

Under the holdings of the Courts of Texas in construing the statutes applicable in this case, the Second Motion for Rehearing should never have been filed and the application for writ of error should have been filed in the Court of Civil Appeals within thirty days from the overruling of their first Motion for a Rehearing on July the 12th, 1929. This was not done. And for this reason, evidently, the Supreme Court of Texas dismissed this case for want of jurisdiction.

Section One, of Article 1728, R. S. 1925, of the State of Texas, provides that the Supreme Court has appellate jurisdiction in cases of the nature of the one here in question where the judges of the Courts of Civil Appeals disagree on any question of law material to the case.

In this case there was a dissenting opinion by Justice Funderburk on several questions of law recited in his dissenting opinion shown at pages (42-47 R.) Certainly had the appellants

complied with the practice act above mentioned the Supreme Court, under the express provisions of the Statute, would have taken jurisdiction.

Under Section 3, of Article 1728, R. S. 1925, the Supreme Court has appellate jurisdiction in cases "involving the validity of Statutes," necessary to a determination of the case. It seems to us that beyond question had the appellant properly invoked the jurisdiction of the State Supreme Court, by complying with the local practice act, it would have secured a hearing in this case.

Under the practice in the State of Texas, the Supreme Court, in dismissing a case for want of jurisdiction, does not, as a general rule, state the grounds for such dismissal. And, in this case, in dismissing the plaintiff's petition for writ of error for want of jurisdiction, (R. 63) the Court does not give any reason for its decision; nor does it give any ground for overruling the Motion for Rehearing on the application for a Writ of Error. (R. 63.) It is evident, however, that the Court followed the line of

decisions on this question holding that the application for Writ of Error must be filed within 30-days from the overruling of the Original Motion for Rehearing. In construing the statute above cited, the Supreme Court of Texas in the cases of Vinson vs. Carter 166 S. W. 363, and Henningsmeyer vs. Bank 195 S. W. 1137, definitely state the rule that the application for writ of error must be filed in the Court of Civil Appeals within 30-days from the overruling of the first Motion for Rehearing.

In Smith vs. Patterson 241 S. W. 113, Justice Powell for the Supreme Court uses this language:

> "Again, it is definitely settled by two very recent decisions of the Supreme Court, in opinion by former Chief Justice Phillips, that petition for writ of error must be filed within 30-days of the overruling of the **original** motion for rehearing. Otherwise a different rule would permit an extension of the time fixed by the statute for the filing of the petition for writ of error simply through the filing of successive motions of the same character." * * *

And in the case of the National Compress Company vs. Hamlin 269 S. W. 1024, in a case very similar in procedural facts to the one here presented, Justice Greenwood for the Supreme Court of Texas again holds that the application for writ of error must be filed in 30-days after the first Motion for rehearing is overruled, and that the filing of the application, within 30-days **after the overruling of a second motion,** is too late.

This record shows that the appellant here has not exhausted his remedies provided under the said procedure for relief, and appellees insist, under the holdings of this Court in such cases, that the appeal herein should be dismissed This Court, in the case of

> Maria Matherson, et al vs. The Branch of the Bank of The State of Alabama, 7th Howard 258, 12th Law Ed 692,

dismissed the writ of error because of the failure of the appellants to comply with the State Practice in seeking a hearing before the Supreme Court of the State of Alabama. A simi-

lar holding was also made in the case of Chappell Chemical Co., vs. Sulphur Mines Co., of Virginia, 43 Law Ed 520, 172 U. S. 472. This holding was also followed in the cases of

Ry. Co. vs. Sealy 248 U. S. 363,

Spokane etc., Water Co., vs. Madison 212 U. S. 565,

Stratton vs. Stratton 239 U. S. 55, 60 Law Ed. 142.

And directly in point, is the very recent case of Marianna Mathews vs. Louis J. Huwe, 70 Law Ed. 266, 269 U. S. 261, in which the court says:

> "Another reason why the motions to dismiss should be granted, even if the foregoing conclusion were wrong, is that the plaintiffs in error, did not exhaust all their remedies for review by the Supreme Court of the state. After their petitions for writs of error as of right were denied, they had under the Ohio practice the right to apply to the Supreme Court in its discretion for writs of certiorari to bring the cases to that court for its consideration. No such application was made."

These cases, we believe, are clearly against

the jurisdiction of this court where the appellant has not exhausted his remedy in the State court and has not complied with the state practice in seeking to have his case passed on by the Court of last resort in the state from which the appeal is taken.

Appellees respectfully request that the appeal be dismissed for want of jurisdiction.

Respectfully submitted,

Attorney for Appellees.

CALLAWAY & CALLAWAY,
of Brownwood, Texas.
of Counsel for Appellees.

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NOV 29 1930
CHARLES ELMORE CROPLEY

No. 49

IN THE

Supreme Court of the United States

—o—

BAIN PEANUT COMPANY OF TEXAS, ET AL., Appellants

vs.

DAVE PINSON AND C. B. GUYGER Appellees.

—o—

Appeal from the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas.

—o—

Appellee's Brief

—o—

MARK CALLAWAY,
Counsel for Appellants.

CALLAWAY & CALLAWAY
Of Counsel.

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No. 49

—o—

IN THE

Supreme Court of the United States

—o—

BAIN PEANUT COMPANY OF TEXAS, ET AL., Appellants

vs.

DAVE PINSON AND C. B. GUYGER Appellees.

—o—

Brief for Appellees

—o—

To The Honorable Supreme Court of the United States:

I.

REPORT OF OPINIONS DELIVERED BY THE COURTS BELOW.

The opinion of the Court of Civil Appeals for the 11th Judicial District of Texas on the last trial of this case is reported in 19th S. W. (2nd) 203. This, however, was the third appeal of this case. The first opinion, purely on a question of privilege, was delivered by the Eighth

Court of Civil Appeals and is found in 273 S. W. 655. On the next appeal the opinion by the Eleventh Court of Civil Appeals of Texas, is reported in 287 S. W. 87. On that appeal the opinions by the Supreme Court are found in 292 S. W. 204 and 294 S. W. 536.

II.

JURISDICTION

The Appellees have filed a motion to dismiss this case in this court for want of jurisdiction, and this brief is submitted without prejudice to said motion.

III.

STATEMENT OF THE CASE

The Appellant's statement of the case, as set out in its brief at pages two to six, we believe, is in the main correct, and is sufficient to apprise the Court of all facts necessary to a decision of the point in issue.

IV.

COUNTER PROPOSITION TO APPELLANT'S ASSIGNMENT OF ERROR

Section 23, Article 1995 of the Revised Civil

Statutes of Texas does not violate the equal protection clause of Section I of the Fourteenth Amendment to the United States constitution wherein such statute provides that "suits against private corporations, associations or joint stock companies may be brought in any county in which the cause of action or any part thereof arose," because this statutory provision does not deprive corporations of any fundamental right, safeguarded by the Fourteenth Amendment of the United States constitution, and the fact that the statute provides a different method of procedure, or a different forum in which suits against corporations, associations or joint stock companies may be tried from the forum in which suits against individuals may be tried, does not deprive either class of the equal protection of the law, or the protection of equal laws, since under this statute equal administration of justice may be obtained in either forum.

V.

ARGUMENT

Appellants contend that they have been denied equal protection of the law in the trial of

this case, because under the provisions of Subdiv. 23 of Art. 1995 of the Revised Statutes of the State of Texas the appellant was forced to stand trial in Comanche County, Texas, where the cause of action arose, instead of being permitted to remove the case on its plea of privilege to Tarrant County, where its principal place of business was located. The part of the subdivision of the Texas Statute complained of as being repugnant to Sec. I of the Fourteenth Amendment of the United States Constitution reads:

> "Suits against a private corporation, association or joint stock company, may be brought in any county in which the cause of action or any part thereof arose."

This character of procedural statute has been the subject of attack in many courts in many states of the United States, and so far as we have been able to ascertain, has stood the test of constitutionality wherever it has come up for decision.

In the case of Lewis vs. Southern Pacific R. Co. 5th Pacific, 79, decided in 1884 by the Su-

preme Court of the state of California, that court held that Section 16 of Article 12 of the Constitution of California was not in violation of the Fourteenth Amendment of the United States Constitution. That article of the California Constitution provided:

> "A corporation or association may be sued in the county where the contract is made, or is to be performed, or **where the obligation or liability arises or the breach occurs.**"

The court, in passing on the constitutionality of this proposition, in a short opinion says:

> "Nor are we able to see wherein the provision of the state constitution in question conflicts with the provision of the Fourteenth Amendment to the constitution of the United States."

Then again in Cook vs. W. S. R. Mfg. Co. 115 Pacific, 318, the Supreme Court of California again up-held the constitutionality of this procedural provision in 1911. In the Cook case the question of this provision of the California state constitution being repugnant to the Fourteenth Amendment to the United States Constitution

was directly under attack and the court held this provision did not violate or conflict with the 14th Amendment.

Also in the case of Rafael vs. People's Bank, 187 Pacific, 53, the same provision of the constitution was attacked again and the Supreme Court of California up-held its validity.

In 1913 the Supreme Court of Georgia in the case of Central Georgia Power Co. vs. Stubbs 80 S. E. 636 up-held a statute of Georgia in all respects similar to the one under attack in this case. This was a case in which the Power Company, built a huge dam which backed water on to the plaintff's land in an adjoining county up the river from the dam. The plaintiff sued the Power Company in the county of his residence under the Georgia statute, Acts of 1912 page 68, Sec. 4, which declares:

> "All railway and electric companies shall be sued in the county in which the cause of action originated by any one whose person or property has been injured by such railway or electric company, its officers or agents."

The Power Company attacked this provision of the Georgia statute as being in contravention of the Fourteenth Amendment of the United States constitution. The Supreme Court of Georgia directly held that this provision, in all essential respects like the one under attack here, was not in conflict with the U. S. constitution.

The Supreme Court of Missouri, in the case of Begley vs. Mississippi Valley Trust Co. 252 S. W. 84, says:

> "It is insisted by respondent's learned counsel: That section 1180 R. S. 1919, which provides that: 'Suits against corporations shall be commenced in the **county where the cause of action accrued** * * * or in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business,' is unconstitutional because section 1177, R. S. 1919 requires actions against the resident of the state to be brought, 'either in the county within which the defendant resides, or in the county within which the plaintiff resides and the defendant may be found.' That therefore,

corporations, being persons within the meaning of the equal protection clause of the Fourteenth Amendment to the constitution of the United States, are thus denied the equal protection of the laws of this state relating to the venue of civil actions. In other words, that such laws make an arbitrary and unreasonable classification of individuals and corporations in fixing the venue of civil actions. * * *

"The provision that suits must be brought against the corporation in the county where the **cause of action accrued is not a discrimination in any manner against the corporation** or in favor of the individual, because the cause of action may accrue, as well in the county where the corporation is located, as in the county where the individual bringing the suit resides, or it may accrue in some county where the corporation is not located, has no agent, and where the plaintiff does not reside. The classification, which the courts hold is vicious and violates the Fourteenth Amendment, is only unreasonable and arbitrary classification, and does not apply to reasonable and proper classification. No authorities need be cited in support of this proposition. It is elementary. The statute com-

plained of has been in existence as it now stands since the revision of 1855, and as far as we have been able to ascertain the bar of this state has never before in this court attacked it as being unreasonable and arbitrary classification, and violate of fundamental laws, except as applied to libel cases. * * *"

It will be seen from this quotation that a statute, in all essentials exactly the same as the one under attack here has been up held by the Supreme Court of Missouri.

In the case of Morrimac Veneer Co. vs. McCalip 92, Southern 817, the Supreme Court of Mississippi held constitutional a statute which reads:

"Chap. 166 laws of 1908. Civil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendant or any of them may be found, **and if the defendant is a domestic corporation, in the county in which the corporation is domiciled or in the county * * * where the cause of action may occur or accrue."**

In that case the constitutionality of the Missis-

sippi statute was under direct attack, and the statute was held not to violate the Fourteenth Amendment.

In the recent case of Grayburg Oil Co. vs. Powell, 15 S. W. (2nd) 542, in an opinion by the commission of appeals, adopted and approved by the Supreme Court of the State of Texas, that court has definitely decided in favor of the constitutionality of the statute which the appellant claims is unconstitutional in this case.

In that case the court discusses the decisions of the Third Court of Civil Appeals in the Dublin Mill & Elevator case and the Houston Light and Power case, cited in that opinion, in which opinions the court of civil appeals held subdivision 23, Art. 1995 R. C. S. unconstitutional. Our court also discusses the case of Power Mfg. Co. vs. Saunders 274 U. S. 490, on which those opinions were based, and in that connection says:

> "In our opinion the decision of the Supreme Court of the United States in the Power Manufacturing Company case, supra., is not authority for holding any part

of said venue statute unconstitutional. In the Power Manufacturing Company case the court had under consideration a state venue statute of Arkansas. * * * The vice in the Arkansas statute was not that it provided a different venue for corporations and private individuals, but that it made an arbitrary and unreasonable classification, in that it placed domestic corporations in one class and foreign corporations doing business in the state by permission of the state, in another and less advantageous class as to venue. * * *

"Our statute, Subdiv. 23 of Article 1995 R. C. S., makes no such classification or discrimination as is condemned in the Power Manufacturing Company case; but it covers by its terms all private corporations, associations or joint stock companies, be they foreign or domestic. Under the holdings of the appellate courts of this state the same laws of venue cover and apply to all domestic and all foreign concerns embraced without discrimination of any character."

In the above quotations from many of the state courts of last resort we have tried to call the court's attention to decisions on statutes in

substance, and in many cases in exact words, like the statute complained of by the appellants in this case. In every case we have been able to find where similar statutes have been construed in any state of the union they have been up held as not in violation of the Fourteenth Amendment of the United States constitution.

This court, in our opinion has ruled adversely to appellant's contention in this case in the case of Cincinnati Street Railway Co. vs. Snell, 48 Lawyer's Edition 604. This was a case in which Snell sued the defendant railway company in Hamilton County, Ohio, and sought to take advantage of an Ohio statute to remove the case from Hamilton County to an adjoining county. The Ohio statute provided that where a corporation having some fifty stock holders was a party to a suit, the opposite party might, by securing the affidavit of five credible persons that he could not get a fair trial in the county, remove the case to an adjoining county.

The railway company attacked the constitutionality of that statute, claiming that it denied corporations the equal protection of the laws.

Chief Justice White, in the opinion of the Court holding that such statute did not deprive corporations of equal protection of the laws says this:

> "But it is fundamental rights, which the Fourteenth Amendment safeguards, and not the mere forum which a state may see proper to designate for the enforcement and protection of such rights. * * * It is not, under any view, the mere tribunal into which a person is authorized to proceed by a state which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the state has provided equal laws prevail."

That opinion very ably discusses the exact legal question, which we believe should determine this case against appellant's contention.

We believe that our venue statute affecting actions against corporations is based on a proper classification of and is supported by a pertinent distinction between corporations and individuals. It is evident that the venue laws and those regarding process and service on individuals and corporations cannot be made the same. Cor-

porations are strictly creations of statute law and must be made the subject of different regulations from those governing individuals. We believe that should this venue statute be held unconstitutional, the majoriy of our other venue statutes regarding corporations will be stricken down under constitutional objections similar to the one presented here. Litigation against railroads in this state, which now may be filed in any county through which the railroad passes will be drawn to one or two of the principal cities where the main offices of the companies are located. Litigation against insurance and bonding companies, which now may be brought in the counties where the loss occurs or the policy holders reside, will be drawn tc one or two principal cities where most of such companies have their main offices. Should the state be denied the right to make a distinction between individuals and corporaions as to the service of process and the forum in which suits may be tried, litigation will be congested in a few of the great cities of the state in such manner as to practically render it impossible for individual

litigants to ever secure judicial determination of their rights.

We will not undertake in this brief to analyze the cases cited by the appellants in their brief. They rely principally upon the case of the Power Mfg. Co. vs. Saunders, 274 U. S. 490 in which this court held a venue statute of the state of Arkansas unconstitutional. We believe, however, an examination of that case will show, as our Supreme Court found in the Grayburg Oil Company case, that it is no authority for holding the Texas venue statute here attacked, unconstitutional. The Arkansas statute obviously made an unjust and unreasonable discrimination as between domestic and foreign corporations, seeking the adjudication of cases in the courts of Arkansas. We do not believe that this court undertook to hold in that case, as contended by the appellants, that venue statutes should be made in all essentials the same as to suits against individuals and corporations. No other case cited by the appellants it seems to us furnishes any support or authority for their contention.

We respectfully request that this case be affirmed.

Mark Galloway,
Counsel for Appellees.

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No. 49

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1930

BAIN PEANUT COMPANY OF TEXAS, ET AL.,
Appellants

vs.

DAVE PINSON AND C. B. GUYGER,
Appellees

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLANTS' PETITION FOR REHEARING

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AMERICAN BRIEF CO., 838 MONROE ST., FORT WORTH

No. 49

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1930

BAIN PEANUT COMPANY OF TEXAS, ET AL.,
Appellants

vs.

DAVE PINSON AND C. B. GUYGER,
Appellees

APPELLANTS' PETITION FOR REHEARING

To The Honorable Supreme Court of the United States:

On January 29, 1931, the Supreme Court of Texas entered an explanatory order which fully sustains appellants' position with reference to the jurisdiction of this Court, insofar, at least, as such jurisdiction may be affected by the subject matter of appellees' motion to dismiss. We include that order and the motion upon which it was entered as an appendix hereto. A certified copy of those documents has been filed with the Clerk. In the case of *Whitney vs. California*, 274 U. S.

357, 71 L. Ed. 1095, this Court considered such an order under conditions practically identical with the situation now before the Court and thereupon reinstated a writ of error previously dismissed. Appellants respectfully and earnestly pray the Court to consider that order and motion as a part of this Petition for Rehearing.

* * * * * *

The order of dismissal entered January 19, 1931, reads:

> "The appeal herein is dismissed for want of a properly presented federal question. John vs. Paullin, 231 U. S. 583, 585; Central Union Telephone Co. vs. Edwardsville, 269 U. S. 190, 195; Beaty vs. Richardson, 276 U. S. 599."

Examination of each of those authorities and of the prior reports of the decisions of the several state courts discloses that those courts in each instance found and declared either an actual want of jurisdiction arising from a clearly stated violation of some essential procedure, or else refused to review the Federal question raised in the lower courts because of some definitely indicated failure to observe the proper procedure to that end.

Thus in *John vs. Paullin,* 106 Pac. 838, the Oklahoma Supreme Court dismissed a writ of error to the trial court for want of juricdiction, because it found that plaintiffs in error had failed to bring before the Court within the statutory time certain indispensible parties. In *City of Edwardsville vs. Central Union Telephone*

Co., 141 N. E. 206, the Illinois Supreme Court held that an appellant had waived his Federal question by failing to appeal directly to that Court, instead of appealing first to a district court of appeals, under a statute requiring appeals involving the constitutionality of a statute to run directly to the Supreme Court, the penalty for violation of the statute being a waiver of such constitutional question. And the Georgia Supreme Court in *Beaty vs. Richardson*, 138 S. E. 54, held that an appellant there waived the right to have it review a Federal question raised below by his failure to cite authorities supporting his contention or to brief the question in the Supreme Court. Here there is no express finding by the Supreme Court of Texas that it did not have jurisdiction and no intimation that its refusal to pass on the Federal question resulted from any failure by appellants properly to present that question. Such conclusion rests upon inference alone arising out of the apparent ambiguity of the judgment of that Court which dismissed Bain Peanut Company of Texas' application for writ of error "for want of jurisdiction." The explanatory order shown in the appendix hereto clears away that ambiguity in favor of appellants' contention with respect thereto and favorably to the jurisdiction of this Court.

Appellees advance but one argument against jurisdiction, viz: That the judgment of the Supreme Court of Texas dismissing "for want of jurisdiction" Bain Peanut Company of Texas' application for writ of error spoke a want of actual jurisdiction, from which they conclude that said application did not suspend the fi-

nality of the judgment of affirmance by the Court of Civil Appeals, dated July 12, 1929; and, in consequence, this appeal allowed January 23, 1930, more than ninety days after the date of that judgment, comes here too late. The Court has suggested no other ground for dismissing this appeal, nor can any other inference be drawn from the authorities cited in the order of dismissal. Those authorities simply illustrate the familiar principle that this Court will not entertain jurisdiction to review a state court judgment until the complaining party shall have exhausted the remedies provided by his local procedure in seeking a review by the state court of last resort.

If by any possibility appellants misapprehend the meaning of this Court's order of dismissal, and said order literally reflects the basis of the Court's decision, appellants most respectfully submit that the Court is in error in concluding that the Federal question was not properly presented. This Court has repeatedly indicated that it is not particularly concerned with either the form or time in which a Federal question is presented to a state court whose judgment is brought here for review; the essential considerations here being (a) that the Federal question was raised in and determined by the state court, and (b) that the record discloses those facts. This was illustrated in the case of *Sullivan vs. State of Texas,* 207 U. S. 416, 52 L. Ed. 274, in which the Federal question was first raised on motion for rehearing in the Court of Civil Appeals of this State. But since it was acted on by that Court, this Court held that it had been presented in a timely manner. At page 9 of the Record

is an assignment of error filed in the trial court, which is clearly sufficient to raise the Federal question. That assignment of error was a part of the Record in the Court of Civil Appeals, because it comes here under the certificate of the Clerk of that Court. That assignment indicates that the Federal question here presented was urged as the sole ground of error in the action of the trial court in overruling Bain Peanut Company of Texas' general demurrer to plaintiffs' controverting affidavit; and that the asserted right of Bain Peanut Company of Texas to have the case transferred to Tarrant County was denied solely because of the statute in question, the constitutionality of which, under the equal protection clause of the 14th Amendment to the Federal Constitution, was there clearly challenged. At pages 9-11 of the Record is a certified question submitted by the Court of Civil Appeals to the Supreme Court while the case was there pending, in which it was clearly stated by the Court that a correct disposition of the appeal required it to determine whether the trial court had erred in overruling the aforesaid demurrer to appellees' controverting plea. It further unequivocally stated (R. 10) that a correct answer to that question depended upon whether or not the statute in question violated the equal protection clause of the 14th Amendment to the Federal Constitution, saying that said statute had been held unconstitutional on that very ground by the Court of Civil Appeals for the Third District in the then recent cases of *Dublin M. & E. Co. vs. Cornelius*, 5 S. W. (2d) 1027, and *Houston Light & Power Co.* 5 S. W. (2d) 1030. The certificate concludes:

> "Is that provision of Subdivision 23, Art. 1995, R. S., 1925, reading as follows: "Suits against a private corporation, association or joint stock company may be brought in any county in which the cause of action, or a part thereof, arose,' repugnant to the 14th Amendment to the Constitution of the United States?"

The certificate was withdrawn by the Court of Civil Appeals on the express ground that the Supreme Court has "upheld the constitutionality of the statute involved in the case of *Grayburg Oil Co vs. N. P. Powell*, 15 S. W. (2d) 542." The Court of Civil Appeals (R. 13) overruled the Bain Peanut Company of Texas' contention that its plea of privilege to be sued in Tarrant County should have been sustained, stating that the question "arises from the overruling of defendants' demurrer to plaintiffs' controverting affidavit," and that plaintiffs rested their right to maintain venue in Comanche County under the statute solely on the ground that Bain Peanut Company of Texas was a private corporation and that the cause of action arose in that county. It further said, referring to the two Court of Civil Appeals cases cited by the Court in its certificate to the Supreme Court (R. 10) that the statute now before the Court had in those cases been held unconstitutional, but had been subsequently overruled in the case of Grayburg Oil Co. vs. Powell by the Commission of Appeals, with the approval of the Supreme Court. Thus, although the Court of Civil Appeals did not in express terms mention the Federal Constitution, no other possible inference can be drawn from the portion of the Court's opinion which disposed of said question, when read in connection with

the corresponding portion of the Court's certificate to the Supreme Court at page 10 of the Record. The Record does not disclose that any State Constitutional question was raised but it is clearly shown that the statute in question was challenged because of its asserted violation of the equal protection clause of the 14th Amendment to the Federal Constitution. Necessarily, therefore, the Court of Civil Appeals, according to its own language at page 10 of the Record, passed upon and determined the Federal question adversely to the rights of Bain Peanut Company of Texas asserted thereunder. Bain Peanut Company of Texas' Third Assignment of Error in its motion for rehearing, R. 22, challenges the aforesaid conclusion of the Court of Civil Appeals as erroneous, referring specifically to the second and third propositions in its brief before that Court. The proposition at page 24 of the Record is the *second* proposition so referred to, brought forward as a proposition in Bain Peanut Company of Texas' petition for writ of error to the Supreme Court; and that fact appears from the Record at page 25, and the proposition is followed by citation of authorities relied on below and here. Thus appellants presented the Federal question in the trial court and in the Court of Civil Appeals. The Court of Civil Appeals in its own language, in sustaining the action of the trial court, which overruled Bain Peanut Company of Texas' general demurrer to appellees' controverting affidavit, necessarily determined that question against Bain Peanut Company of Texas, R. 10. The question was again presented to the Court of Civil Appeals on rehearing (R. 22); to the

Supreme Court in petition for writ of error by statement, assignment of error, proposition and citation of authorities (R. 23-25); and on rehearing in the Supreme Court (R. 27); by assignment of error in petition for allowance of this appeal (R. 31); and by designation of point here to be relied on (R. 33).

For the reasons mentioned and (a) because the Court of Civil Appeals did consider and rule on the Federal question here presented adversely to appellants' claim, and (b) because the Supreme Court of Texas has said that its refusal to review the case resulted solely from its view that the lower Court had properly disposed of it, any possible doubt as to proper presentation of the Federal question should be dispelled.

Unquestionably under the rule laid down by this Court in *Railway Co. vs. Mihas*, 280 U. S. 102, 74 L. Ed. 207, and *Railway Co. vs. Rock*, 279 U. S. 410, 73 L. Ed. 766, appellants exhausted their remedies in seeking review by and relief from the Supreme Court of Texas by petitioning that Court for a writ of error to the Court of Civil Appeals and moving it for rehearing after the application had been refused. That motion for rehearing was overruled January 22, 1930, R. 28. Hence, for the purpose of this appeal, the judgment of the Court of Civil Appeals became final on that date.

We cannot escape the conclusion that the Court, resolving against its jurisdiction, a doubt arising from the unfortunate ambiguity of the Texas Supreme Court order, in effect sustained appellees' motion and so dismissed the case. Nor can we doubt that the Court is

unwilling to determine an appellant's rights upon such purely technical considerations, without passing on the merits of the case, when, on rehearing, jurisdiction is clearly shown.

When appellees filed their motion here to dismiss, appellants asked the Supreme Court of Texas for some clarifying order such as we now present to dispel any uncertainty regarding the jurisdiction of this Court raised by that motion. The members of the Court fully concurred in appellants' view that its judgment of dismissal "for want of jurisdiction" indicated merely a refusal to review the case, not any actual want of jurisdiction, and that the form of that order was controlled by Art. 1728, R. C. S. Upon considerations then regarded by the members of that Court as justifying a refusal of our request, they did refuse it. However, when it appeared that the ambiguity of their said order probably resulted in a failure of appellants to secure a review of the case on the merits here, they very graciously made the clarifying order herewith submitted.

Public interest of more than usual importance attaches to the case. The statute here questioned affects in a very vital way substantial rights of many litigants almost every day. Attorneys and clients subject to the statute are uncertain as to their rights. Although our Supreme Court has sustained the statute against the very constitutional objection here urged, some of our courts of civil appeals have accepted that decision reluctantly. The Third or San Antonio Court of Civil Appeals in *Central Union Life Insurance Co. vs. Pesek*, 22 S. W. (2d) 1090, went so far as to write an opinion

—unanswerable in our opinion—against the constitutionality of said statute after the Supreme Court had sustained it. We believe this Court's jurisdiction is now clear. The question is fully and fairly raised. An early decision by this Court of last resort is needed to clarify the situation; and it will not be settled until this Court has finally spoken. It will be here again for decision soon unless now decided, and we most respectfully and earnestly ask the Court now to take jurisdiction and finally to decide the case on its merits.

Respectfully submitted,

.....

.....

Counsel for Appellants.

CERTIFICATE

We, the undersigned, counsel for appellants in the above entitled and numbered cause, hereby each certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

WITNESS OUR HANDS at Fort Worth, Texas, this ..... day of ..... 1931.

.....

.....

Counsel for Appellants.

APPENDIX

Mo. No. 9436

BAIN PEANUT COMPANY OF TEXAS
Plaintiff in Error

vs.

PINSON AND GUYGER
Defendants in Error

Plaintiff in Error has filed a motion for an order nunc pro tunc correcting the order heretofore entered by this Court dismissing its application for a writ of error.

It is true, as contended by plaintiff in error, that its failure to file an application for writ of error within thirty days from July 12, 1929, on which date the Court of Civil Appeals vacated its initial judgment and entered a more onerous judgment against plaintiff in error, was not regarded as defeating the jurisdiction of the Supreme Court to revise by writ of error such more onerous judgment. In our opinion, the Court of Civil Appeals clearly acted within the scope of its lawful authority on July 12, 1929, when, on motion seasonably filed, it vacated its initial judgment. There then remained subject to review or enforcement only the judgment of July 12, 1929. Whatever errors were to be corrected were those arising from that judgment on the rehearing in the Court of Civil Appeals. The rule is

established in Texas that a party's petition for writ of error to the Supreme Court must be filed within thirty days from the date on which his motion for rehearing was overruled in the Court of Civil Appeals. *Schleicher* v. *Runge*, 90 Tex. 456; *Vinson* v. *Carter & Brother*, 106 Tex. 274; *Henningsmeyer* v. *Bank*, 109 Tex. 117. Nevertheless, each time the Court of Civil Appeals, on motion or motions duly filed, validly vacates its previous judgment or judgments and substitutes therefor a different valid judgment against a party, he is thereby entitled to seek correction, through rehearing, of such different judgment, and it is not compulsory that he invoke the jurisdiction of the Supreme Court earlier than within thirty days from the overruling of his last motion for rehearing. Our statutes contemplate that a case should be reviewed by the Supreme Court at the instance of one party not piecemeal but as an entirety. Hence, it is only when the jurisdiction of the Court of Civil Appeals has terminated by overruling a party's permissible motion or motions for rehearing and thus leaving its judgment in the form it directs that it be finally enforced against him, that the period of thirty days for him to invoke the jurisdiction of the Supreme Court under writ of error begins finally to run.

In the above cited case of Henningsmeyer v. Bank, the Court called attention to the fact that it did not question the authority of the Court of Civil Appeals to set aside a former order and enter an entirely different order, but the ruling was that no effect would be given to such action when taken for no other purposes than

to permit an application for writ of error to be filed after lapse of the statutory time.

Regarding the last judgment as that complained of, since the first was already vacated, the Court considered plaintiff in error's application as presented in due time under its practice stated in 3 *Texas Jurisprudence*, section 175, as follows:

> "When the order complained of is not made until the rehearing in the Court of Civil Appeals it is necessary for the complaining party to make a further motion for rehearing if he would in the Supreme Court urge as erroneous the order complained of; for, in the light of the rules of the Supreme Court, the motion for rehearing, to form the basis for a consideration in the Supreme Court, must be predicated upon the judgment or order of the Court of Civil Appeals actually deciding the matters complained of."

While regarding the application for writ of error as filed within the proper and statutory time, we intended and did dismiss the application for want of jurisdiction under Article 1728 as amended by Acts 1927, 40th Legislature, page 214; Article 1728, Complete Texas Statutes of 1928, having concluded that while the case otherwise came within the potential jurisdiction of the Supreme Court, it was a case where the judgment of the Court of Civil Appeals was a correct one, but we were not satisfied that the opinion of the Court of Civil Appeals had in all respects correctly declared the law. For that reason, it was the Court's duty, under the statute, to refuse to take jurisdiction and to dismiss the case for want of jurisdiction.

Because the order entered on the minutes correctly reflects the action of the Court, the motion of plaintiff in error is overruled.

THOMAS B. GREENWOOD,
Associate Justice.

Opinion delivered January 29, 1931.

I, F. T. Connerly, Clerk of the Supreme Court of the State of Texas, do hereby certify that the above and foregoing two pages contain a true and correct copy of the original opinion of the Supreme Court of Texas on Motion to Correct Judgment Entry in the case of Bain Peanut Company of Texas, Plaintiff in Error vs. Pinson & Guyger, Defendant in Error, Mo. No. 9436, (App. No. 17123), from Comanche County, Eleventh District, said original opinion having been delivered by the Supreme Court of Texas on January 29th, 1931, and now being on file in this office.

IN TESTIMONY WHEREOF, Witness my hand and the seal of the Supreme Court of the State of Texas, at the City of Austin, this the 29th day of January, A. D. 1931.

(SEAL) F. T. CONNERLY,

Clerk of the Supreme Court of Texas.

No. 9436

IN THE
SUPREME COURT OF THE STATE OF TEXAS

BAIN PEANUT COMPANY OF TEXAS

vs.

PINSON AND GUYGER

To the Honorable Supreme Court of Texas:

Petitioner, Bain Peanut Company of Texas, represents that on May 3, 1929, the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas entered an order, on appeal of said case from the District Court of Comanche County, Texas, reforming the judgment of said District Court against it, and affirming the judgment as reformed. The result of such reformation was to reduce the money judgment rendered by the District Court against Bain Peanut Company of Texas by more than $1,000 and to adjudge the costs, both of the trial court and of the Court of Civil Appeals, against appellees. Both appellant below and appellees filed motion for rehearing in due time, appellant asking that the case be either reversed and rendered or reversed and remanded and appellees asking that the order of reformation be set aside and that the case be affirmed in its entirety. On July 12, 1929, the motion

of appellant below was overruled and that of appellees granted. The order of reformation and affirmance theretofore entered, the judgment rendered thereon and the opinion of the court filed in connection therewith were all expressly vacated and withdrawn and a new judgment, one of affirmance, entered as of that date and a new opinion as of that date was rendered by the court. Thereupon, in accordance with the rules of this court prescribed in the case of *Knox vs. McElroy*, 103 Texas 357, and *Roth vs. Murray*, 105 Texas 6, appellant below presented another motion for rehearing addressed to the judgment and opinion of July 12, 1929, being the only judgment and opinion of the Court of Civil Appeals then or at any time thereafter in existence. On October 18, 1929, said motion, designated for convenience as a second motion, but in fact and in law under the decisions referred to an original motion for rehearing, was overruled by the Honorable Court of Civil Appeals. A petition for writ of error was presented to this Court in due time, conforming in all respects to the practice prevailing in this Court; and on December 11, 1929, this Court entered an order upon said petition in form dismissing same as for want of jurisdiction; and motion for rehearing thereon was overruled January 21, 1930.

Petition for the allowance of an appeal was presented to and granted by the Chief Justice of the Court of Appeals at Eastland, Texas, and Bain Peanut Company of Texas thereafter perfected its appeal to and lodged the record in the Supreme Court of the United States. Appellees below, being also appellees in the United States

Supreme Court, there filed a motion to dismiss the appeal which has been sustained by the Supreme Court of the United States by order entered January 19, 1931. That motion related to an alleged failure of Bain Peanut Company of Texas to petition this Honorable Court for writ of error within the time prescribed by the Statutes of the State of Texas and the rules of this Court. The sole ground for said motion is that Bain Peanut Company's petition for writ of error should have been presented to this Court within thirty days after July 12, 1929, when its first motion for rehearing was overruled, instead of filing a motion addressed to the judgment and opinion of affirmance rendered by the Court of Civil Appeals on July 12, 1929, and awaiting an order overruling same. It is argued from the aforementioned circumstances that the order of dismissal of Bain Peanut Company's petition for writ of error indicated the judgment of this Court was that said petitioner had not sought relief before this Court in a timely manner and that this Court was therefore in fact without juricdiction; while it is Bain Peanut Company's view that the aforesaid order of this Court evidenced nothing but a refusal of this Court to exercise its discretion to refuse to review the judgment of the court below, and that the judgment and order of dismissal should be referred to and is controlled by Section 2, Article 1728, Revised Civil Statutes, 1925, as amended by Chapter 44, Acts of the Fortieth Legislature in 1927.

The form of the order of this Court, while made in obedience to said statute, and conforming to the language thereof, is ambiguous when read in the ordinary

meaning of the language there used. That ambiguity has resulted in the Supreme Court of the United States being misled as to the true character and significance of the aforesaid order and dismissal, that court obviously regarding that the order of dismissal was intended by this Court to declare an actual want of jurisdiction, and such conclusion, in the state of the record before it, was fatal to the jurisdiction of that court.

In the circumstances Bain Peanut Company of Texas says that by reason of an ambiguity in an order of this Court, made in obedience to a legislative mandate, prescribing the form of such order, it has suffered great injury in that such form of order has misled the United States Supreme Court, and has resulted in an order of that court dismissing its appeal and thereby denying it a hearing on the merits of that appeal. Its rights in that appeal, asserted under the Constitution of the United States and of which the United States Supreme Court is the final judge, have been therefore denied, not upon consideration of the merits but upon procedural considerations and a judgment of this Court which did not in unambiguous language speak its true character and significance.

While petitioner is aware that this court no longer has jurisdiction of the case, it does submit that the Court has at all times, and regardless of the pendency of the case on appeal in the United States Supreme Court, jurisdiction over its records and the right to so amend or correct them as to make them speak the truth, and a brief in support of this contention is herewith submitted.

It is imperative, unless petitioner's rights are to be finally determined on a technical matter of procedure rather than on the merits of the case, that the order heretofore entered be amended or modified or that the Court make some declaration clarifying and officially declaring the true character and significance of such order so that the same may be brought to the attention of the United States Supreme Court in its true light, character and legal significance in connection with Bain Peanut Company's petition for rehearing before that Court. That petition for rehearing must be filed within 25 days after January 19, 1931.

WHEREFORE, petitioner respectfully prays that this Honorable Court do now forthwith enter an order nunc pro tunc declaring and defining the actual character and legal significance of the order heretofore entered by this Court on December 11, 1929, wherein Bain Peanut Company's petition for writ of error was dismissed for want of jurisdiction, so that the records of this Court with respect to the matter shall speak the truth in unambiguous language.

Respectfully submitted this 23rd day of January, A. D. 1931.

W. A. KEELING,

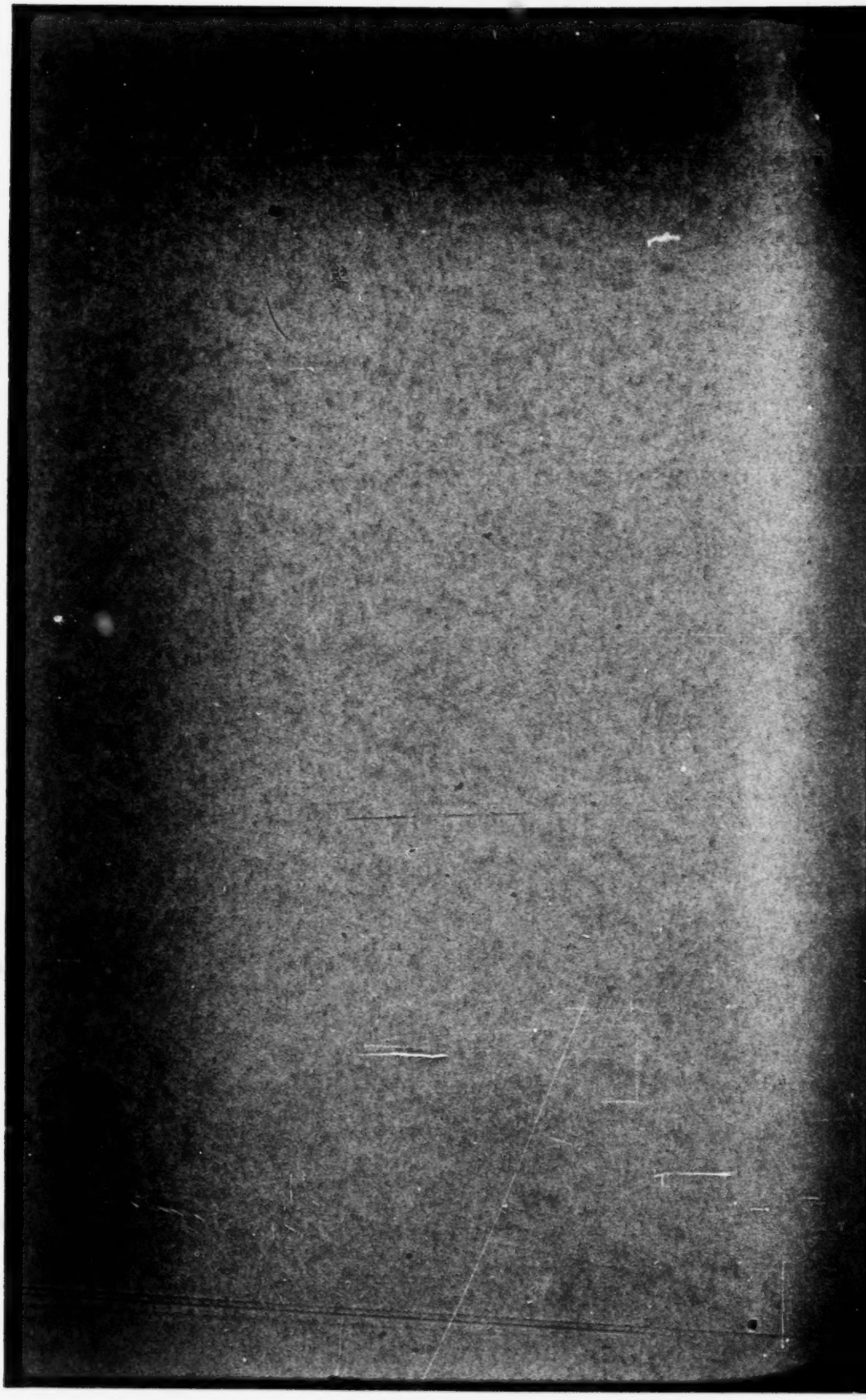
BRYAN, STONE, WADE & AGERTON,
BY B. G. MANSELL,
Attorneys for Petitioner.

(ENDORSED) Mo. No. 9436. App. No. 17123. BAIN PEANUT COMPANY OF TEXAS VS. PINSON AND GUYGER. MOTION TO CORRECT JUDGMENT ENTRY. Filed in Supreme Court Jany. 23, 1931. F. T. Connerly, Clk., By H. L. Clamp, Depty. OVERRULED Jany. 29, 1931.

I, F. T. Connerly, Clerk of the Supreme Court of the State of Texas, do hereby certify that the foregoing 4 pages contain a true and correct copy of the original Motion to Correct Judgment Entry, together with all endorsements thereon, in the case of Bain Peanut Company of Texas, Plaintiff in Error, vs. Pinson & Guyger, Defendants in Error, Motion No. 9436, from Comanche County, Eleventh District, said original motion now being on file in this office.

IN TESTIMONY WHEREOF, Witness my hand and the seal of the Supreme Court of the State of Texas, at the City of Austin, this the 29th day of January, A. D. 1931.

(SEAL) (Signed) F. T. CONNERLY,
Clerk of the Supreme Court of Texas.



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No. 49

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1930

BAIN PEANUT COMPANY OF TEXAS, ET AL.,
Appellants

vs.

DAVE PINSON AND C. B. GUYGER,
Appellees

Appeal From the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas

APPELLANTS' PETITION FOR REHEARING ON THE MERITS

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AUTHORITIES CITED

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Lewis v. South Pac. Coast R. Co., 66 Cal. 209.

Life Assn. v. Harris, 94 Tex. 25.

Liggett v. Baldridge, 278 U. S. 105.

L. & N. R. R. Co. v. Barber Asphalt Co., 197 U. S. 430.

McClung v. Pulitzer Pub. Co. (Mo.), 214 S. W. 193.

Merrimac Veneer Co. v. McCalip, 129 Miss. 671.

Patsone v. Pennsylvania, 232 U. S. 138.

Pool v. Pickett, 8 Tex. 122.

Power Mfg. Co. v. Saunders, 274 U. S. 490.

Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389.

Railroad Com. v. E. T. R. Co., 264 U. S. 867.

Union Life Ins. Co. v. Pesek, 22 S. W. (2d) 1090.

Truax v. Corrigan, 257 U. S. 312.

T. & N. O. R. R. Co. v. Miller, 221 U. S. 406.

No. 49

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1930

BAIN PEANUT COMPANY OF TEXAS, ET AL.,
Appellants

vs.

DAVE PINSON AND C. B. GUYGER,
Appellees

APPELLANTS' PETITION FOR REHEARING ON THE MERITS

To The Honorable Supreme Court of the United States:

Appellants respectfully move the Court to set aside the judgment of affirmance herein and to reverse the case on rehearing, because they believe the judgment and opinion of the Court demonstrably erroneous. It is well known that the eminent Justice who delivered the Court's opinion herein entertains, and has consistently advocated, more tolerant views with respect to the permissible scope of state action under the Fourteenth Amendment than have the majority of this Court. Obviously, we believe, those well-known views have been permitted to control the decision in this case, contrary to the frequently expressed views of a majority of the Court. This we shall undertake to demonstrate by at least three opinions of this court, each rendered within

the past three years, which we earnestly submit are in principle conclusive against the validity of the statute here questioned and against the stated views of the Court in support of its validity. The Court's opinion herein is in harmony with the views expressed by Mr. Justice Holmes in his dissenting opinions in the three cases mentioned, but inconsistent with the majority opinions therein.

* * * *

We submit that the subjoined proposition is supported by authority of this Court's opinions and should control the decision in this case.

PROPOSITION

The Fourteenth Amendment guarantees to citizens of the United States not only equal protection of laws, but the protection of equal laws. When that right has been denied a member of a class to his injury by the application of a state statute discriminating against the class to which he belongs, and the discrimination is apparent, the statute must fall under the Fourteenth Amendment unless the classification rests upon some real and substantial difference between the offended class and others similarly situated pertinent to the very subject matter of the legislation. Mere difference is not enough, nor will a mere conjecture that the difference between the classes bears or may bear a reasonable relation to the subject matter of the legislation suffice to save the offending statute. Liggett vs. Baldridge, 278 U. S. 105.

As we read the Court's opinion, the present decision rests upon two propositions, each of which, in our opinion, is in conflict with applicable principles of law heretofore stated by this Court, viz:

1.

That state procedural statutes are beyond the reach of the Fourteenth Amendment, and that the Federal Constitution is concerned only with the protection of fundamental rights, and

2.

Upon the *conjectural* hypothesis that "there is likely to be such a difference between the business done by a corporation and that done by a private person" as will support the separate and more burdensome classification of corporations from individuals for purposes of venue.

* * * *

The opinion of the Court correctly declares that in the creation of permissible classifications by statute "the range of the State's discretion is large," but however broad that range may be it is clearly limited by the often stated principle that "a classification to be consistent with the equal protection clause must be based on *a real and substantial difference having reasonable relation to the subject of the legislation.*" *Quaker City Cab Company vs. Pennsylvania*, 277 U. S. 389.

The question before the Court for decision is well stated thus:

> "In deciding whether a corporation is denied the equal protection of the laws when its creator establishes a more extensive venue for actions against it than is fixed for private citizens, we have to consider * * * whether the difference does injustice to the class generally;"

but we cannot assent to the application here of the proposition involved in the further statement in the Court's opinion that—

> "The question seems to be answered by Cincinnati Street Ry. Co. vs. Snell, 193 U. S. 30, 36, 37, which lays down that if the protection of fundamental rights by equal laws equally administered is enjoyed, the Constitution does not forbid allowing one person to seek a forum from which another in the same class is excluded."

This Court itself refused to so apply it in a similar situation in the recent case of *Power Manufacturing Company vs. Saunders,* 274 U. S. 490. There the appellees sought to sustain a discriminatory Arkansas venue statute upon express authority of the Snell case and upon the very principle found therein as above quoted; but the Court there clearly distinguished the Snell case insofar as it seemed to assert immunity of procedural statutes from the reach of the Fourteenth Amendment. The reasons why the Court in the Saunders case refused to be bound by the above principle announced in the Snell case and here relied on to sustain the statute in question are so clearly and vigorously stated in the Saunders opinion by Mr. Justice Van Devanter that it is inconceivable to us that the Court advisedly

consented to rest its present decision upon the Snell case in whole or in part. We believe simple justice to the Court requires that the language of Mr. Justice Van Devanter in the Saunders case in distinguishing the Snell case should here be set out at length, which we do:

> "The case of Cincinnati Street R. Co. vs. Snell, 193 U. S. 30, 48 L.Ed. 604, 24 Sup. Ct. Rep. 319, is cited as if venue provisions were there held to be beyond the reach of the equal protection clause. *But this is a strained and inadmissible interpretation.* That was an action by an individual against a corporation which was begun, conformably to a general statutory requirement, *in the county where the defendant had its principal office and was engaged in business.* Another statute authorized the court to change the venue in such an action 'to the adjacent county most convenient to both parties' if it appeared that the corporation had more than fifty local stockholders, and if it was also shown by the affidavit of the other party, supported by five credible citizens, that he could not have a fair and impartial trial in the county where the suit was begun. A showing was made which brought the case within the statute; and the court changed the venue over the defendant's objection that the statute operated unequally and was invalid in that it permitted the other party but not the corporation to secure the change. The statute doubtless proceeded on the assumption, first, that a corporation with many local stockholders might have such influence in the county that the other party would be at a serious disadvantage, unless provision were made whereby the court, on an adequate showing, might change the place of trial to another county free from such

> influence and as convenient as might be to both parties, and secondly, that the corporation was not likely to suffer any prejudice in its home county through having many stockholders there. At all events the difference in the situation of the parties and the relation of that difference to the matter of changing the place of trial were such that it could not be said of such discrimination as was shown in the statute that it was without a reasonable and adequate basis. *The opinion affirmatively shows that the defendant was not objecting to the place designated by the court for the trial, but only that the statute did not accord it an equal opportunity to secure a change from the county where the action was begun.* When the opinion is examined with the actual situation in mind it has little bearin on the case now before us." (Italics ours).

And we say with the court that when the Snell case, here relied upon to sustain the statute, is examined with the actual situation in mind, it has as little bearing on this case as it was held to have in the Saunders case.

While yet discussing the Saunders case, we cannot refrain from observing that the writer of the Court's present opinion there declared in his dissenting opinion that while a foreign corporation merely doing business in a state and having its works elsewhere would necessarily be inconvenienced to a certain extent by being sued anywhere away from its headquarters, that "the difference to it between one county and another is likely to be less than it will be *to a corporation having its headquarters in the state.*" (Italics ours). In that view we fully concur, and believe the fact suggested offers an

additional argument in support of the invalidity of the statute now before the court.

The case of *Louisville & Nashville R. R. Co. vs. Barber Asphalt Co.*, 197 U. S. 430, but states the principle that one cannot complain that a statute is unconstitutional, because discriminatory, unless the discrimination injuriously affects the class to which he belongs as distinguished from a particular injury to himself from the operation of the statute complained of. And *Patsone vs. Pennsylvania*, 232 U. S. 138, but holds that a non-member of the class alleged to be discriminated against cannot take advantage of such discrimination. When so understood, those cases have no particular pertinency to a decision of the merits of this case, but only state the rules applicable to ascertain under what conditions a complaint of discrimination is available to a person who claims to be injured thereby. Hence those cases will not be noticed further.

In common with most states, Texas has declared it to be the general policy of the law that defendants are privileged to insist on being sued in the counties of their domiciles. As said by the Supreme Court of Texas in *Pool vs. Pickett*, 8 Tex. 122, that rule "has always been regarded as just in itself and *eminently advantageous to defendants*, for whose benefits it was intended." (Italics ours.) By the statute in question the valuable privilege accorded by the general policy of the law to all defendants is withdrawn from an important and ever increasingly important class of citizens of the United

States. That is a discrimination. Is it arbitrary or is it based on some reasonable difference between the classes so established pertinent to the very subject of venue of actions? On this subject Judge Smith of our San Antonio Court of Civil Appeals in *Southern Union Ins. Co. vs. Pesek*, 22 S. W. (2d) 1090, (after our Supreme Court had sustained the validity of the statute) said:

> "This discrimination sought to be created by the exception between the corporation and the individual is of course obvious, for by the terms of the statute the one is denied, while the other is vouchsafed, the very valuable privilege of litigating causes of action asserted against it, or him, in the county of its or his domicile. As the domicile of the domestic corporation is just as certainly and definitely fixed and ascertainable, in a particular county of the state, as is that of the citizen, and, as either is just as easily reached, served, and haled into court in the county of such domicile as the other, the writer is unable to perceive any rational basis for the frank discrimination, with relation to the subject of venue of suits."

We believe that argument unanswerable. Under the facts conclusively found by the Court of Civil Appeals, Bain Peanut Company of Texas had its domicile in Tarrant County, Texas. R. 10. Not only so, but none of the other exceptions to the rule of general venue of actions in the county of a defendant's domicile existed in the case, R. 10, the plea of privilege being conclusive of the facts therein alleged under our law unless successfully challenged by sworn plea and proof, which is

not the situation here. It is further true that appellees both resided in Comanche County, R. 1. Thus Bain Peanut Company, over its proper objection, was required to litigate in a county which the law assumes to have been favorable to appellees—among their neighbors—and in a county in which it was not domiciled, had no office, agency, or agent,—and why? *Solely because it was a corporation,* not because it was a particular kind of corporation and not because of the character of business it did or had done, for an individual or the members of a partnership engaged in the identical business, and having committed the identical alleged breach of contract in that county could not have been sued there over proper objections. Since Bain Peanut Company, a corporation, could only do business through agents and had no agents in Comanche County, it was obviously necessary for it to take the deposition of or carry its agents who were involved in the alleged breach of contract to that county as witnesses. That fact, as suggested in *Power Mfg. Co. vs. Saunders,* supra, necessarily entailed some additional expense. Fort Worth, where Bain Peanut Company was domiciled and its managers resided (R. 1), is the county site of Tarrant County, as the town of Comanche is of Comanche County. The distance between those points is 106 miles by rail and slightly more by highway. That fact is not alleged or proven, but is true, which fact is judicially known to the Court as it was so judicially known in *Carroll vs. The United States,* 267 U. S. at p. 160, that "Grand Rapids is about 152 miles from Detroit." Both facts are matters of geographical location

and can be ascertained with equal facility from the sources from which such judicial knowledge is in fact derived, namely, published maps and general geographical knowledge and sources. Hence it is clear that not only as a member of a class but as an individual representative of such class did Bain Peanut Company suffer injury in this case by the operation of the statute in question; and the discrimination is real and substantial. There are more than 250 counties in Texas. Galveston and Amarillo, for instance, are 775 miles apart. If this statute is upheld corporate defendants may be sued and forced to defend, as they often have been in fact, from 500 to 700 miles from their domiciles under it, while private citizens identically situated labor under no such immensely burdensome handicap. It but remains to determine whether the discrimination can be justified upon any difference between corporations and individuals relevant to the matter of venue of actions.

That question must be answered in the light of the fact that the questioned statute, as construed and here applied, relates to all private corporations as a class regardless of the character or extent of their business, subjecting them to suit in any of the 265 counties of the state where a cause of action or a part of it arises; and where, as in this case, such onerous venue rests exclusively upon an application of the statute, the county of venue *must* be one in which the corporation is not domiciled and in which it has no established agency or agent. Therefore, in every case in which venue necessarily depends alone upon an application of the exceptional provision of our venue statute here consid-

ered, every fact exists to establish *prima facie* a burden incident to the defense of such suit not imposed upon individual defendants identically situated. Then is the difference alone between a corporation and an individual sufficient to justify such discrimination? And is a mere *conjecture* that—

> "There is likely to be such difference between the business done by a corporation and that done by a private person that the state may well take it into account when it permits a corporation to be formed"

sufficient—or any—evidence that such difference in fact does exist or, if so, that such difference is pertinent to the matter of venue of actions against corporations? The language just quoted from the Court's opinion projects the issue into the realm of conjecture, suggests the *possibility* of difference pertinent to that issue but facts indicative of such conjectural differences are noticeably lacking. What then are the differences between "the business done by a corporation and that done by a private person?" The principles underlying the successful operation of business, whether done in private or corporate form, are of universal application. Does the Court suggest a possible difference in business morals or ethics between the conduct of private and corporate business? To do so is to indict our whole business fabric, for notoriously the overwhelming bulk of all business is now done in Texas as elsewhere by corporations, and the tendency is constantly increasing. The corporation statutes of Texas now provide 88 separate purposes for which corporations may be organized. Taking into consideration that under such general permissible purposes

as "manufacturing" or "merchandising" any relevant business may be conducted, it is both true and obvious that practically every known lawful business—except practice of the learned professions—may be and is in fact conducted in Texas, as in most states, by corporations. Do the conjectured differences between private and corporate business relate to their comparative sizes? That difference might be pertinent to the visitatorial and regulatory powers which a state may deem advisable to exercise over its corporate citizens, but certainly not to venue of actions between litigants, some of whom happen to be corporations. Such difference so considered is certainly factitious and inadmissible. Is the fact that a corporation must transact business by agents one of the suggested differences? If so, individuals likewise may, and in fact often do so. The law knows no distinction in the rules of agency as between the agents of individuals and those of corporations, nor of the legal incidents of those rules. The controlling principles of agency are identical, whether that relationship exists between individuals and corporations or solely between individuals.

If, as suggested by the Court, the difference between business done by private citizens and corporations is conceivably relevant to the matter of venue of actions against corporations, we submit that our venue statute itself makes suitable provision for those differences at every point where the same may be pertinent to the subject. For instance, in addition to the challenged portion of Section 23 of Article 1995, that section also provides that corporations in general may be sued in

the county of their domiciles as well as in any county in which they have "an agency or representative." We cannot agree with appellees that the invalidity of such provision follows from the invalidity of the provision here questioned. Corporations must transact business through agents. Where a corporation has an agency or maintains a representative, it may be well said, in view of its purely legal character, that where the agency or established representative of a corporation is, there the corporation is also; hence those provisions do not offend against the general principle which permits defendants to be sued in the counties of their domicile. Section 23 further provides that railway corporations and their receivers, assignees or trustees, may be sued "in any county through or into which the railroad of such corporation extends or is operating." Section 25 provides that actions for personal injuries against railroad corporations, the receivers, assignees or trustees thereof, may be brought in the county in which the injury occurs or in the nearest county to that of the residence of the plaintiff in which the corporation runs or operates its road, or has an agent. Those exceptional provisions are obviously pertinent to such actions if not to the character of business conducted by railway corporations. Section 28 provides a different and pertinent venue for suits by mechanics and laborers against railway corporations for unpaid wages. Section 28 provides for still different, yet clearly pertinent, venue with respect to actions against various kinds of insurance corporations, when such actions relate to or arise out of contracts of insurance issued by them. Our venue statute

is set out in full in the appendix to appellant's jurisdictional statement herein filed, and we respectfully refer the Court thereto. However, none of the considerations which are relevant to the diverse venue prescribed with reference to certain causes of action and against certain classes of corporations have any application to the exceptional venue provision here challenged. That provision *baldly* classifies all corporations for purposes of venue, regardless of their character, or the character or extent of their business, and subjects them to more onerous venue than is provided with respect to individuals and partnerships, *solely because of their corporate character*. In cases, such as this, in which venue is controlled exclusively by the venue provision in question, the facts exclude every other condition under which a corporation may be sued in a county other than its domicile, and determine its liability to a more onerous venue solely because of its corporate character.

Contrary to the proposition announced in this case, based on the Snell case, this Court has definitely committed itself in the cases of *Truax vs. Corrigan*, 257 U. S. 312, *Kentucky Finance Corp. vs. Paramount Auto Exchange*, 262 U. S. 544, and *Power Manufacturing Co. vs. Saunders*, 274 U. S. 490, to the proposition that procedural statutes are within the reach of the Fourteenth Amendment. In the two cases last cited the Court is found definitely committed to the proposition that procedural statutes specifically relating to venue of actions "must be in keeping with the limitations which the Constitution of the United States places upon state action." In the Saunders case it was said:

> "Procedural statutes are not excepted, but must fall like others when in conflict with those limitations."

While we have undertaken the burden to show, and by argument believe we have shown, that there is nothing in the mere difference between individuals and corporations at all pertinent to justify a more onerous classification of the latter for purposes of venue, we believe the decisions of this Court properly understood require a complainant such as appellant only to make a *prima facie* case; that is, to establish the fact of discrimination and of probably injury resulting therefrom to the class of which it is a member. Thus in the Saunders case the fact of discrimination against and probable injury to foreign corporations was obvious, as the fact of discrimination against and probable injury to corporations as a class is obvious under our statute. Proceeding from that point the Court spoke with reference to the alleged basis for discrimination arising out of the difference between foreign corporations on the one hand and domestic corporations and individuals on the other as follows:

> "So far as their situation has any pertinence to the venue of transitory actions it is not distinguishable from that of domestic corporations and individuals. Certainly there is not substantial difference. *The opinion of the state court does not point to any relevant distinction, nor have counsel suggested any.* Of course, the restricted venue as to domestic corporations and individuals is prompted by considerations of convenience and economy; but these considerations have equal application to foreign corporations. So far as the plaintiffs in such ac-

> tions are affected, it is apparent that there is no more reason for a state-wide venue when the action is against a foreign corporation than when it is against a domestic corporation or a natural person. So we conclude that the special classification and discriminatory treatment of foreign corporations are without reasonable basis and essentially arbitrary." (Italics ours).

While the decision in that case was limited to the precise question before it, we do not believe the Court intended to or could logically have so limited an application of the principles there announced. At least we are unable to conceive anything in the difference between corporations as a class and individuals which is at all pertinent to the consideration ordinarily affecting venue of actions, either from the standpoint of a plaintiff or a defendant; and we believe the language of the Court just quoted is as fully applicable to the question now before the Court as it was to the question there decided. In any event no distinguishing feature between the two situations has been pointed out or definitely suggested.

We now come to discuss the three recent cases by this Court adverted to in the opening paragraph of this petition, and to attempt to demonstrate that the views of the majority of the Court in each of those cases cannot be reconciled with the conclusions stated by the Court in its opinion in this case. Those cases are:

> Quaker City Cab Co. vs. Pennsylvania, 277 U. S. 389; Liggett Company vs. Baldridge, 278 U. S. 105; Frost vs. Corporation Commission of Oklahoma, 278 U. S. 515.

We discuss them in the order indicated. The opinion

of the Quaker City Cab Company case was by Mr. Justice Butler and was decided May 28, 1928. By statute of Pennsylvania a gross receipt tax was imposed upon all corporations owing and operating taxicabs. No similar or compensating tax was levied upon individuals or partnerships engaged in the same business. The Court said:

> "The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation. Power Mfg. Co. vs. Saunders, supra. *No decision of this court gives support to such a classification. ..In no view can it be held to have more than an arbitrary basis.*" (Italics ours).

Mr. Justice Roberts, then at the bar, argued the case as he did the next one discussed, and it will be noted that Mr. Justice Holmes dissented from the opinion of the Court upon grounds indistinguishable from those upon which the opinion is based in this case.

The case of Liggett vs. Baldridge also involved a Pennsylvania statute which attempted to deny the privilege of ownership and operation of pharmacies to corporate owners. Clearly no business is more definitely related to the public interest than that of operating a drug store. It seems to us that if there is any conceivable business in which the mere difference between a cor-

porate and individual owner might be pertinent to or form the basis for a discriminating classification, it would be a business engaged in the sale of commodities intimately and constantly affecting the public health as are the commodities sold by drug stores. Yet in that case the Court definitely repudiated the view here announced in support of the decision, namely, that the difference alone between private and coroporate character does justify separate classification withdrawing from corporations as a class valuable rights accorded to private persons. Again it will be noted that the Court did not indicate that the complainant was required to show beyond doubt that the classification was unjustified; but the discrimination and probable injury being made to appear, rested its decision upon the fact that no evidence was presented by those seeking to sustain the statute that gave to it any character other than the apparent one of arbitrary discrimination. The Court simply held that the act created an unreasonable and unnecessary restriction upon lawful business because—

> "no facts are presented by the record, and, so far as appears, none were presented to the legislature which enacted the statute, that properly could give rise to a different conclusion. * * * * If detriment to the public health thereby has resulted or is threatened, *some evidence of it ought to be forthcoming. None has been produced, and, so far as we are informed, either by the record or outside of it, none exists.* The claim, *that mere ownership of a drug store* by one not a pharmacist bears a reasonable relation to the public health, finally *rests upon conjecture, unsupported by anything of substance.* This is not enough; and it becomes our duty to de-

clare the act assailed to be unconstitutional." (Italics ours.)

That opinion was rendered by Mr. Justice Sutherland November 19, 1928; and Mr. Justice Holmes dissented therefrom, giving expression to his well-known views that the Fourteenth Amendment should not be applied as a check upon state action to the extent that the Court there applied it.

The opinion in Frost vs. Oklahoma Corporation Commission was also by Mr. Justice Sutherland, and was rendered February 18, 1929. The situation there was that a corporation held to be one organized for profit, although it claimed to be a co-operative mutual benefit association, was relieved of certain burdens, requisite in the case of an individual, which enabled it to secure from the corporation commission a permit to erect and operate a cotton gin under conditions more favorable than those available to a private citizen. The Court pointed out that the only basis for the attempted classification was the mere difference between an individual and a corporation, saying:

> "As a basis for the classification attempted, it lacks both relevancy and substance. Stripped of immaterial distinctions and reduced to its ultimate effect, the proviso, as here construed and applied, baldly creates one rule for a natural person and a different and contrary rule for an artificial person, *notwithstanding the fact that both are doing the same business with the general public and to the same end*, namely, that of reaping profits. That is to say, it produces a classification which subjects one to the burden of showing a public necessity for

> his business, from which it relieves the other, and is essentially arbitrary, because based upon no real or substantial differences having reasonable relation to the subject dealt with by the legislation. Power Mfg. Co. vs. Saunders, 274 U. S. 490, 493." (Italics ours.)

As we have pointed out above, a corporation in this state engaged in the identical business as an individual may be sued in a county other than that of its domicile, and where it has no agent or representative, but *where the cause of action arose merely because it is a corporation*, while an individual or partnership under the identical situation would be privileged to remove such suit to the county of the residence of the individual or to that of one or more of the partners. No reason has ever been suggested by appellees in the court below or here, nor has any reason been advanced by the Court, why the mere difference between an individual and a corporation is pertinent to the matter of venue of suits against the latter while such difference is not pertinent to the right of a corporation to own and operate drug stores, to operate taxicabs free of a tax not imposed upon individuals similarly situated, or to operate a cotton gin under conditions more favorable than those accorded to an individual. And we believe that no such reason has been pointed out for the single and simple reason that none such exists.

We come now to discuss the cases from several state jurisdictions cited by the Court as rendering "more probable" the reasonableness of the venue provision before the court. First, however, we desire again to point

out that the Court has never said the statute before it *is* reasonable, but only that it *may be* or probably is so; that the challenged statute is sustained alone upon conjecture. We shall not discuss the case of *Grayburg Oil Co. vs. Powell,* 118 Tex. 354, because it is obvious that the judgment here appealed from rests upon that decision by our state Supreme Court and everything here said in respect of the opinion of the Court of Civil Appeals applies with equal force thereto.

In *Lewis vs. South Pacific Coast R. Co.,* 66 Cal. 209, the California Supreme Court did sustain a provision of the California constitution somewhat similar to our venue provision here involved. The Court, however, apparently overlooks the fact that the case was expressly overruled by the same court in the later case of *Grocers' Fruit Growing Union vs. Kern County,* 150 Cal. 466, and overlooks also the fact that the later case was cited with apparent approval by this Court in Power Mfg. Co. vs. Saunders in support of its view that the statute there involved was unconstitutional. Reference to the later California case just cited discloses that the decision in the earlier case was based solely upon the proposition that a corporation was not a citizen of the United States within the Fourteenth Amendment. Fairness to the Court requires us to state, however, that the California Supreme Court in the still later case of *Cook vs. Ray Mfg. Co.,* 159 Cal. 694, again sustained the venue provision without, however, expressly overruling Fruit Growing Union vs. Kern County. The sole basis for the latter decision was that corporations organized subsequent to the effective date of the constitutional venue

provision involved had, by accepting their charters, impliedly assented to and were estopped to deny the validity of that provision. That argument will be dealt with at a subsequent point.

The case of *Central Georgia Power Co. vs. Stubbs*, 141 Ga. 172, dealt with the venue statute relating not to corporations as a class, but only to a restricted class of corporations engaged in the production, transmission and sale of electric power; and controlled the venue only of actions for injuries to the persons or property of litigants arising out of the acts of the company, its officers, agents or employees, in the county where the action was sought to be maintained. It related, therefore, to the venue not only of a restricted class of actions, but also to a restricted class of defendants. The Court characterized the statute as remedial (procedural) and not as one affecting substantial rights; and it may be assumed that such conclusion afforded the basis of that decision, because no other reason was advanced. The constitutional objection was simply overruled, but it is significant that the authorities relied on in support of that action were certain cases by the Supreme Court of Alabama. Reference to those cases discloses that a somewhat similar Alabama statute dealing with transitory actions against a restricted class of corporations was sustained upon the sole ground that procedural statutes were beyond the reach of the Fourteenth Amendment. In that respect the case of Truax vs. Corrigan and Power Mfg. Co. vs. Saunders, supra, each unquestionably cut the ground from under the Georgia decision cited by the Court. And the same criticism applies with

added force to the case of *Merrimac Veneer Co. vs. McCalip,* 129 Miss. 671, by the Mississippi Supreme Court, because that decision was expressly and unequivocally grounded upon the provision that a venue statute, even though invalid, was beyond the reach of the Fourteenth Amendment, because procedural in nature, and did not affect substantial rights of the litigants. That decision rests upon no other argument or proposition, and as authority it falls in the light of this Court's pronouncements to the contrary of the proposition there asserted.

The Missouri case of *Begley vs. Mississippi Valley Trust Co.,* 252 S. W. 84, sustained the validity of a statute similar to ours. When said decision was rendered, the Supreme Court of Missouri consisted of four judges and certain commissioners. The judges of the court were evenly divided, and the statute therefore sustained because the majority of the court were unwilling to overturn it. Again, however, we call attention to the fact that the Supreme Court of Missouri had in the earlier case of *McClung vs. Pulitzer Pub. Co.,* 279 Mo. 370, declared a similar statute relating to venue of libel actions to violate the equal protection clause of the Fourteenth Amendment; and again we call attention to the fact that the Missouri case last cited was also cited by this Court with apparent approval in the case of Power Mfg. Co. vs. Saunders in support of the unconstitutionality of the statute there involved. The judge who wrote the opinion in the McClung case dissented from the conclusion of the Court in the Begley case, as did another judge. That dissenting opinion and his earlier opinion in the McClung case demonstrate to

our minds the unquestionable invalidity of the statute before the Court. Finally, the validity of the Missouri statute was sustained upon the remarkable argument that, since the county where the cause of action arose might in a given case also be the county of the corporation's domicile or in which it had an agent or agency, it did not necessarily discriminate against corporations as a class. That argument avoids a decision of the very question before the court; for, admitting that in a given case more than one ground for venue against a corporation might exist under the Missouri statute as under ours, yet the effect of the statute as a discrimination against corporations as a class must be determined with reference to its operations in those cases where venue necessarily depends upon it, that is, in those cases where the corporation may be sued in a county where it is not domiciled and has no agency or representative, but simply because of its corporate character and the fact that the cause of action arose in the county where venue was sought to be maintained.

Lastly we come to consider the argument suggested by the California case of *Cook vs. Ray Mfg. Co.*, 159 Cal. 694, to the effect that corporations organized and accepting a charter when a constitutional provision or statute such as ours is in effect thereby impliedly assent to and are estopped to deny the validity thereof. That contention is wholly untenable, as this Court has vigorously pointed out on several occasions. Thus in *Cargill vs. Minnesota*, 180 U. S. 452, the State of Minnesota was undertaking to require appellant to secure a license from its railway and warehouse commission be-

fore operating or continuing to operate a grain elevator. Cargill resisted, contending among other things that if he applied for and accepted the license required by the statute, he would be estopped to question its validity. This Court denied that contention in the following language:

> "The defendant, however, insists that some of the provisions of the statute are in violation of the Constitution of the United States, and if it obtained the required license, it would be held to have accepted all of its provisions, and (in the same words of the statute) 'thereby to have agreed to comply with the same.' Article 1. The answer to this suggestion is that the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute or with any regulations prescribed by the state railroad and warehouse commission that are repugnant to the Constitution of the United States. A license will give the defendant full authority to carry on its business in accordance with the valid laws of the state and the valid rules and regulations prescribed by the commission. If the commission refused to grant a license, or if it sought to revoke one granted, because the applicant in the one case, or the licensee in the other, refused to comply with statutory provisions or with rules or regulations inconsistent with the Constition of the United States, the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings."

The foregoing proposition was reaffirmed in the Saunders case, supra, 274 U. S. 490. The proposition so advanced by the Supreme Court of California but states the view held in some quarters that any legislative act

affecting corporations in force when a corporate charter is granted becomes a part of the so-called charter contract between the corporation thereby created and the state, and that the recipient of the license thus granted may not question the validity of the act which brings it into being. If a decision of this case must rest upon that principle, admittedly its application here will rest upon the declared law of the state of Texas on that subject, for what is or is not of the charter contract of a corporation is a question of local law which this Court will follow. The Supreme Court of Texas in *Life Association vs. Harris*, 94 Tex. 25, 57 S. W. 635, speaking with reference to what laws of a state are imported into and become a part of the so-called charter contract, made the following observation:

> "The statute seems to be simply a part of the laws of Pennsylvania regulating contracts of insurance and not one specially defining and limiting the powers of this corporation or of corporations generally. The rule is recognized that a corporation derives all its powers from the law which creates it and that its transactions, wherever they may occur, must be within the powers conferred by that law. This rule is generally held, however, to relate only to the charter of the corporation or to the law under which it is created and by which its powers are defined, *and not to general legislation of the State upon other subjects.* 2 Mora. on Corp., Secs. 967, 968, and cases cited." (Italics ours.)

It is true that the language just quoted is dictum. But it is nevertheless undoubedly the law in Texas on the subject, because the Supreme Court of the State has not otherwise spoken on the proposition and it finds sup-

port in the following authorities: 1 *Cook on Corporations,* Fifth Edition, Section 2; *Thompson on Corporations,* Second Edition, Vol. 1, Section 172; *Fletcher's Cyclopedia on Corporations,* Vol. 2, p. 1736, Section 765. And independently of anything the Texas Supreme Court has said on the subject, this Court has definitely stated the same views in two cases involving the same question with reference to what is or what is not of the charter contract of Texas corporations. See *Railroad Commissions vs. Eastern Texas R. Co.,* 264 U. S. at p. 867, and *T. & N. O. R. R. Co. vs. Miller,* 221 U. S. 406. And in *C. B. & Q. R. R. Co. vs. R. R. Com. of Wisconsin,* 237 U. S. 220, this Court definitely stated that it would not hold general legislative acts to be a part of the charter contract of a corporation unless the courts of that state should so hold; that is, that the question is one of local law concerning which this Court must follow the state courts.

We regret the length to which this argument has gone, but the decision to be finally rendered here is one of importance to the jurisprudence of this country as well as to the litigants. It is essential not only that the rights of litigants be rightly determined but that such rights be determined upon the application of correct principles of law. We earnestly submit that the Court's opinion in this case will not stand the test of comparison with its former very recent opinions involving the application of principles of law to facts which cannot be distinguished in principle from the facts of this case. We, therefore, most earnestly urge the Court to give consideration to the matters now urged in this petition for rehearing to the end, and in the sincere belief, that such consideration will ultimately lead to a reversal of the case, with which prayer this petition is most respectfully submitted.

Respectfully submitted,

B. L. AGERTON,

B. G. MANSELL,

Counsel for Appellants.

CERTIFICATE

We, the undersigned, counsel for appellants in the above entitled and numbered cause, hereby each certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

B. L. AGERTON,

B. G. MANSELL,

Counsel for Appellants.

FILE COPY

FILED
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CHARLES ELMORE

No. 49

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1930

BAIN PEANUT COMPANY OF TEXAS, ET AL.,
Appellants

vs.

DAVE PINSON AND C. B. GUYGER,
Appellees

Appeal From the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas

MOTION TO STAY MANDATE AND PRAYER FOR ORAL ARGUMENT In Connection With APPELLANTS' PETITION FOR REHEARING ON THE MERITS

B. L. AGERTON,

B. G. MANSELL,

Counsel for Appellants

BRYAN, STONE, WADE & AGERTON
Of Counsel.

AMERICAN BRIEF CO., 908 MONROE ST., FORT WORTH

No. 49

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1930

BAIN PEANUT COMPANY OF TEXAS, ET AL.,
Appellants

vs.

DAVE PINSON AND C. B. GUYGER,
Appellees

MOTION TO STAY MANDATE

To The Honorable Supreme Court of the United States:

Believing that the judgment of affirmance herein rendered on February 24th rests upon manifest errors prejudicial to their rights, appellants have filed herein their petition for rehearing on the merits in the belief that same should, and, upon reconsideration, will be granted for the reasons therein set out.

PRAYER FOR ORAL ARGUMENT

The Supreme Court of Texas, in compliance with a controlling statute, entered an ambiguous order on Bain Peanut Company's petition for writ of error below, which resulted in the case being dismissed for want of jurisdiction on original hearing. That circumstance was wholly beyond the control of these appellants. However, the court will recall, that circumstances required counsel to consume more than fifty minutes of oral

argument in discussing the question of jurisdiction. Thus counsel had no opportunity to argue the merits of this appeal orally. Such extended discussion of jurisdictional matters resulted not only from the form of the order by the Supreme Court of Texas, but also from the necessity of answering questions touching that subject propounded by members of the Court, which counsel was neither at liberty nor disposed to disregard. We sincerely believe that an oral argument on the merits, unhampered by technical jurisdictional considerations, will be of value to the Court in determining the petition for rehearing.

WHEREFORE, appellants earnestly pray:

1. That the Court do grant a stay of mandate until their petition for rehearing on the merits shall be finally disposed of; and

2. Either that the petition for rehearing be granted and the case be set down at a future date for oral argument on the merits, or that the petition for rehearing be set down for submission at a future date and that appellants be accorded the privilege of arguing same orally.

Respectfully submitted,

B. L. AGERTON,

B. G. MANSELL,

Counsel for Appellants.

CERTIFICATE

We, the undersigned counsel for appellants, each severally certify that both appellants' petition for rehearing on the merits and this motion for stay of mandate and prayer for oral argument are filed in good faith and not for delay.

B. L. AGERTON,

B. G. MANSELL,

Counsel for Appellants.

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No. 49

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1930

BAIN PEANUT COMPANY OF TEXAS, ET AL.,
Appellants

vs.

DAVE PINSON AND C. B. GUYGER,
Appellees

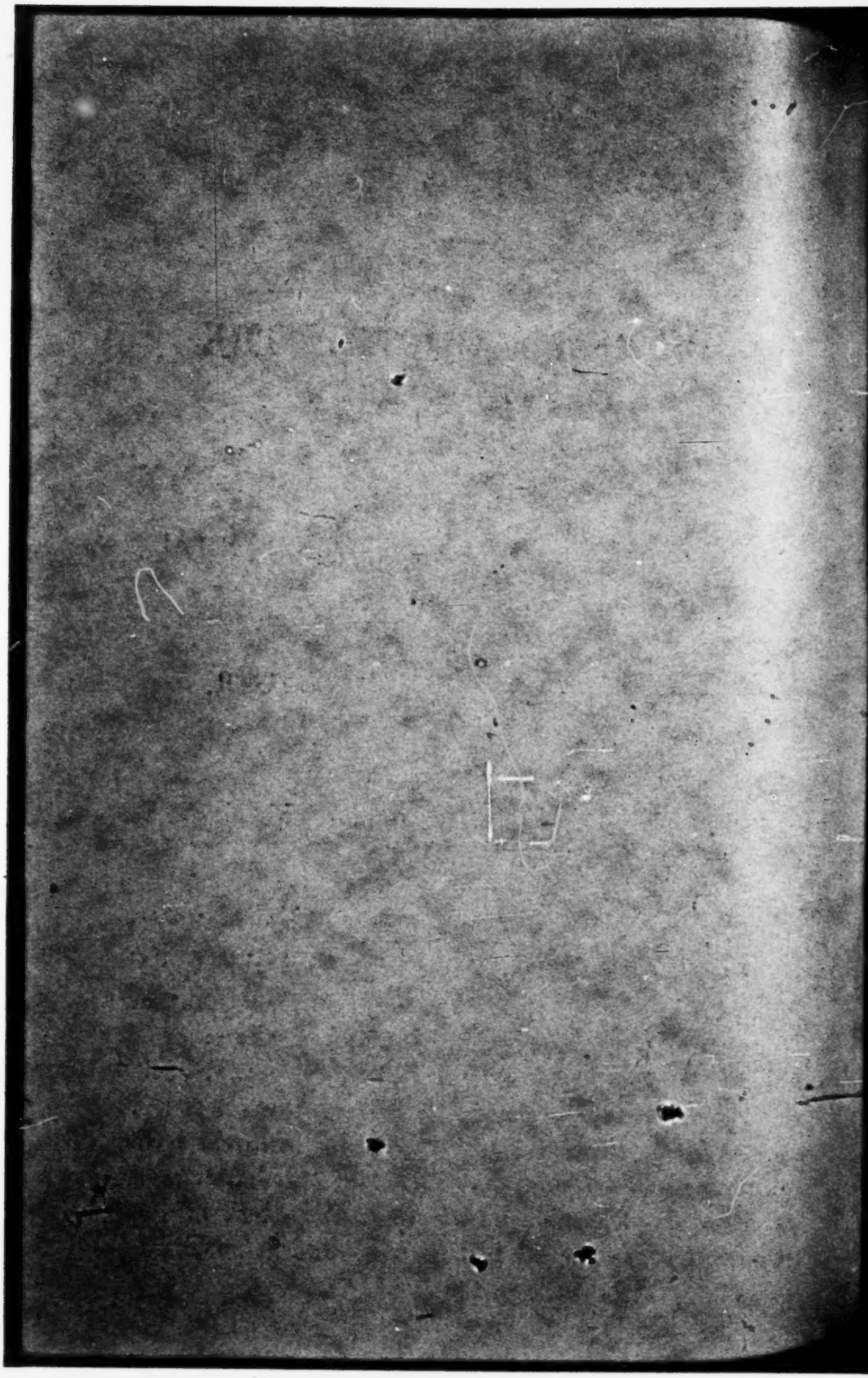
APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLANTS' MOTION TO STAY MANDATE

B. L. AGERTON,
Counsel for Appellants.

BRYAN, STONE, WADE & AGERTON,
and
B. G. MANSELL,
Of Counsel.

AMERICAN BRIEF CO., 938 MONROE ST., FORT WORTH



No. 49

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1930

BAIN PEANUT COMPANY OF TEXAS, ET AL.,
Appellants

vs.

DAVE PINSON AND C. B. GUYGER,
Appellees

APPELLANTS' MOTION TO STAY MANDATE

To The Honorable Supreme Court of the United States:

On January 19th the Court dismissed the appeal herein. So far as appellants can ascertain from the authorities cited in the order of dismissal, the effect of that order was to sustain appellees' motion to dismiss, and appellants verily believe that the reasons urged by appellees for dismissing the appeal did form the basis of the Court's action in that respect. Immediately upon receipt of telegraphic advice from the Clerk of this Court that the appeal had been dismissed, appellants

prepared a motion addressed to the Supreme Court of Texas asking that Court to enter an order declaring the legal significance, in unambiguous language, of the order of that Court entered on December 11, 1929, by which it in terms dismissed "for want of jurisdiction" Bain Peanut Company of Texas' application to the Supreme Court of Texas for a writ of error to review the judgment of the Court of Civil Appeals here appealed from. At the earliest opportunity thereafter, namely, on January 23, 1931, said motion was presented in chambers to the Chief Justice and Associate Justices of the Supreme Court of Texas, and was by them ordered filed and set down for hearing Thursday, January 29, 1931. Notice of the motion was immediately served upon attorneys for appellees, Pinson and Guyger, who filed their answer thereto; and on January 29, 1931, the Supreme Court of Texas in terms overruled but in effect granted said motion and entered an order by which it found and declared that in dismissing Bain Peanut Company of Texas' application for writ of error on December 11, 1929, as "for want of jurisdiction" it did not find or intend to find or declare a want of actual jurisdiction to review the case; but, on the contrary, said petition for writ of error was presented to it in due time and that the Court simply refused to grant the petition in the exercise of its discretion and declined to review the case because the members of that Court were of the opinion that the Court of Civil Appeals had correctly disposed of the case; and, further, that the form of order so entered by the Supreme Court was controlled, in their view of the record and of the disposition made

by the Court of Civil Appeals of the case, by that portion of Article 1728, Revised Civil Statutes of Texas, which provides in effect that when the Supreme Court of Texas is asked to review the judgment of a Court of Civil Appeals by application for writ of error it shall, if it approves the disposition made by the Court of Civil Appeals of the case but does not necessarily approve of all of the principles of law declared by the Court in so doing, dismiss the application for want of jurisdiction.

A copy of that order is printed as an Appendix hereto; and appellants pray that the Court consider same, as was done in practically the identical situation, in the case of *Whitney vs. California*, 274 U. S. 357, 71 L. Ed. 1095. A certified copy of said order and of the motion upon which it was entered have been filed with the Clerk.

Appellants are preparing and will, without delay, and within the time permitted by the rules, file a formal petition for rehearing herein. Their failure to do so heretofore has resulted from no intention to delay, but solely from the fact that they have been compelled to wait upon the Supreme Court of Texas to enter the order hereto attached as a basis for said petition. (In this connection these appellants say that immediately after appellees filed their motion to dismiss the appeal, they presented to the Supreme Court of Texas a request for some such order as it has now entered clarifying their said order of December 11, 1929, herein referred to, but that Court, for reasons then thought by it to be sufficient, refused to grant such request.)

Appellants believe that said order by the Supreme Court of Texas should be considered and that its consideration will lead to a reversal of the Court's decision to dismiss the case, and to a reinstatement of the appeal. They, therefore, respectfully and earnestly pray the Court to enter an order directing the Clerk to withhold issuance of mandate herein until the Court shall have finally disposed of appellants' said petition for rehearing.

Respectfully submitted,

B. L. Eggleston

J. J. Mansell

Counsel for Appellants.

CERTIFICATE

We, the undersigned, counsel for appellants in the above entitled and numbered cause, hereby each certify that the foregoing motion for stay of mandate is presented in good faith and not for delay.

WITNESS OUR HANDS at Fort Worth, Texas, this 30th day of January, 1931.

B. L. Eggleston

J. J. Mansell

Counsel for Appellants.

APPENDIX

Mo. No. 9436

BAIN PEANUT COMPANY OF TEXAS
Plaintiff in Error

vs.

PINSON AND GUYGER
Defendants in Error

Plaintiff in Error has filed a motion for an order nunc pro tunc correcting the order heretofore entered by this Court dismissing its application for a writ of error.

It is true, as contended by plaintiff in error, that its failure to file an application for writ of error within thirty days from July 12, 1929, on which date the Court of Civil Appeals vacated its initial judgment and entered a more onerous judgment against plaintiff in error, was not regarded as defeating the jurisdiction of the Supreme Court to revise by writ of error such more onerous judgment. In our opinion, the Court of Civil Appeals clearly acted within the scope of its lawful authority on July 12, 1929, when, on motion seasonably filed, it vacated its initial judgment. There then remained subject to review or enforcement only the judgment of July 12, 1929. Whatever errors were to be corrected were those arising from that judgment on the rehearing in the Court of Civil Appeals. The rule is

established in Texas that a party's petition for writ of error to the Supreme Court must be filed within thirty days from the date on which his motion for rehearing was overruled in the Court of Civil Appeals. *Schleicher* v. *Runge*, 90 Tex. 456; *Vinson* v. *Carter & Brother*, 106 Tex. 274; *Henningsmeyer* v. *Bank*, 109 Tex. 117. Nevertheless, each time the Court of Civil Appeals, on motion or motions duly filed, validly vacates its previous judgment or judgments and substitutes therefor a different valid judgment against a party, he is thereby entitled to seek correction, through rehearing, of such different judgment, and it is not compulsory that he invoke the jurisdiction of the Supreme Court earlier than within thirty days from the overruling of his last motion for rehearing. Our statutes contemplate that a case should be reviewed by the Supreme Court at the instance of one party not piecemeal but as an entirety. Hence, it is only when the jurisdiction of the Court of Civil Appeals has terminated by overruling a party's permissible motion or motions for rehearing and thus leaving its judgment in the form it directs that it be finally enforced against him, that the period of thirty days for him to invoke the jurisdiction of the Supreme Court under writ of error begins finally to run.

In the above cited case of Henningsmeyer v. Bank, the Court called attention to the fact that it did not question the authority of the Court of Civil Appeals to set aside a former order and enter an entirely different order, but the ruling was that no effect would be given to such action when taken for no other purposes than

to permit an application for writ of error to be filed after lapse of the statutory time.

Regarding the last judgment as that complained of, since the first was already vacated, the Court considered plaintiff in error's application as presented in due time under its practice stated in 3 *Texas Jurisprudence*, section 175, as follows:

> "When the order complained of is not made until the rehearing in the Court of Civil Appeals it is necessary for the complaining party to make a further motion for rehearing if he would in the Supreme Court urge as erroneous the order complained of; for, in the light of the rules of the Supreme Court, the motion for rehearing, to form the basis for a consideration in the Supreme Court, must be predicated upon the judgment or order of the Court of Civil Appeals actually deciding the matters complained of."

While regarding the application for writ of error as filed within the proper and statutory time, we intended and did dismiss the application for want of jurisdiction under Article 1728 as amended by Acts 1927, 40th Legislature, page 214; Article 1728, Complete Texas Statutes of 1928, having concluded that while the case otherwise came within the potential jurisdiction of the Supreme Court, it was a case where the judgment of the Court of Civil Appeals was a correct one, but we were not satisfied that the opinion of the Court of Civil Appeals had in all respects correctly declared the law. For that reason, it was the Court's duty, under the statute, to refuse to take jurisdiction and to dismiss the case for want of jurisdiction.

Because the order entered on the minutes correctly reflects the action of the Court, the motion of plaintiff in error is overruled.

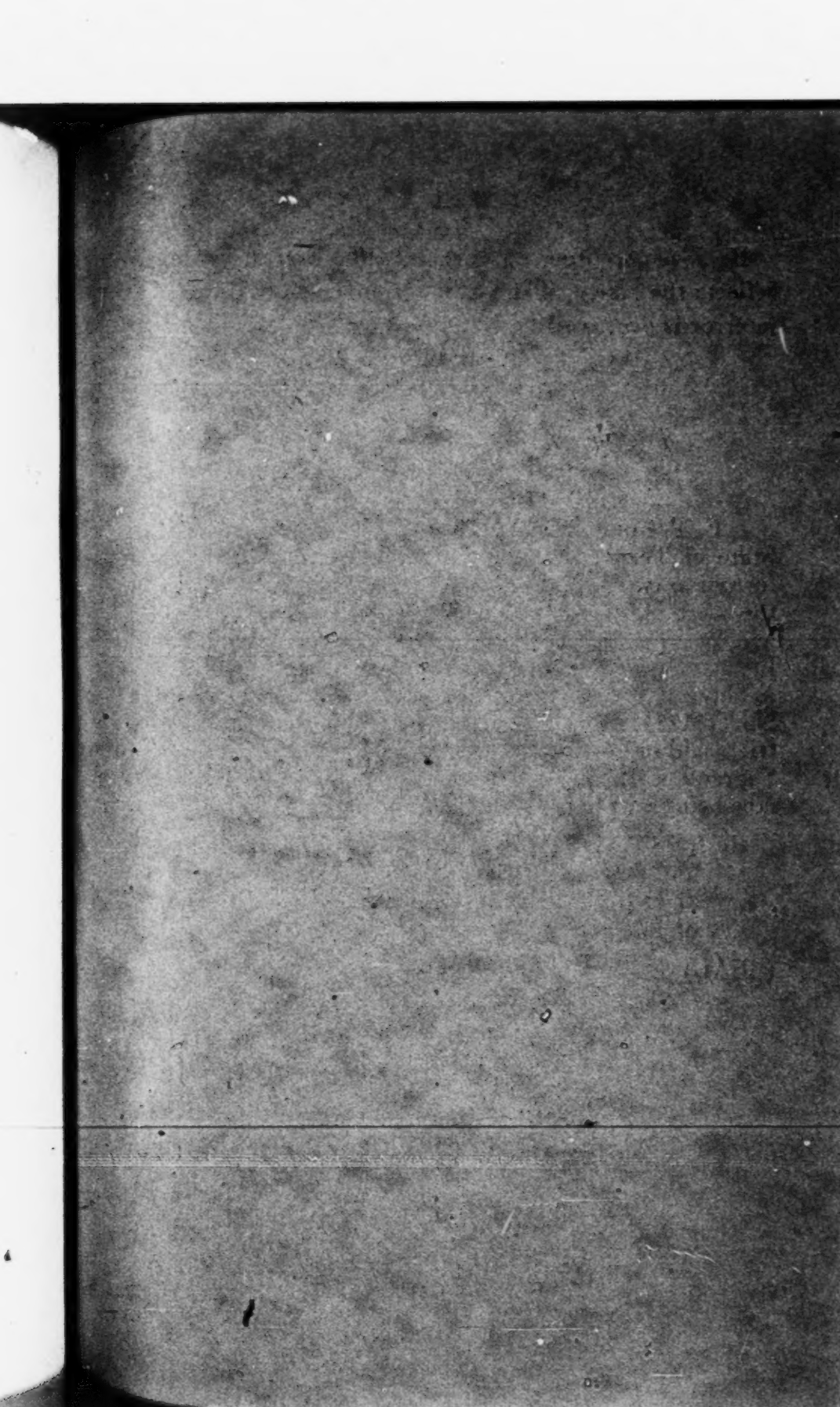
THOMAS B. GREENWOOD,
Associate Justice.

Opinion delivered January 29, 1931.

I, F. T. Connerly, Clerk of the Supreme Court of the State of Texas, do hereby certify that the above and foregoing two pages contain a true and correct copy of the original opinion of the Supreme Court of Texas on Motion to Correct Judgment Entry in the case of Bain Peanut Company of Texas, Plaintiff in Error vs. Pinson & Guyger, Defendant in Error, Mo. No. 9436, (App. No. 17123), from Comanche County, Eleventh District, said original opinion having been delivered by the Supreme Court of Texas on January 29th, 1931, and now being on file in this office.

IN TESTIMONY WHEREOF, Witness my hand and the seal of the Supreme Court of the State of Texas, at the City of Austin, this the 29th day of January, A. D. 1931.

(SEAL) F. T. CONNERLY,
Clerk of the Supreme Court of Texas.



SUPREME COURT OF THE UNITED STATES.

No. 49.—October Term, 1930.

Bain Peanut Company of Texas and United States Fidelity & Guaranty Company, Appellants,
vs.
Dave Pinson and G. B. Guyger.

Appeal from the Court of Civil Appeals for the Eleventh Judicial District, State of Texas.

[February 24, 1931.]

Mr. Justice Holmes delivered the opinion of the Court.

The Bain Peanut Company, a corporation of Texas, was sued in Comanche County of that State, being the county in which the cause of action arose. Its principal office was in Tarrant County, Texas. In due form it raised the question whether the statute of Texas (subdivision 24, Article 1830, R. S. 1911, now Subdivision 23, Article 1995, R. S. 1925) that allowed suits against private corporations to be brought in any county in which the cause of action arose was valid under the Fourteenth Amendment of the Constitution when unincorported individuals are assumed not to be "subject to suit outside their domiciliary counties in a similar situation". We understand the Supreme Court of the State to have upheld the constitutionality of the statute although at first we were misled by the form of the order dismissing the application for a writ of error "for want of jurisdiction". A certificate from the Court executed since the question of our jurisdiction was before us satisfies us that the form was adopted in compliance with the Court's interpretation of a statute, and that while the Court was of opinion that the judgment sought to be brought up was correct in upholding the statute, yet, since it also regarded the opinion as incorrect in its declaration of the law, its duty was to adopt the above quoted form. The judgment below stood affirmed in fact against the fully stated objection of the appellant, and justice requires that the objection should be dealt with, although at first it seemed as if the Supreme Court was acting upon local

grounds of procedure with which we have nothing to do, except when used as a cloak which was not the case here.

Coming then to the merits, we are of opinion that the judgment was right. The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints. In deciding whether a corporation is denied the equal protection of the laws when its creator establishes a more extensive venue for actions against it than is fixed for private citizens we have to consider not a geometrical equation between a corporation and a man but whether the difference does injustice to the class generally, even though it bear hard in some particular case, which is not alleged or proved here. *Louisville & Nashville R. R. Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 430, 434. *Pittsone* v. *Pennsylvania*, 232 U. S. 138, 144. This it is for the corporation to make out. The range of the State's discretion is large. *Armour & Co.* v. *North Dakota*, 240 U. S. 510, 516, 517. The question seems to be answered by *Cincinnati Street Ry. Co.* v. *Snell*, 193 U. S. 30, 36, 37, which lays down that if the protection of fundamental rights by equal laws equally administered is enjoyed, the Constitution does not forbid allowing one person to seek a forum from which another in the same class is excluded. But without asserting a universal proposition it is obvious that there is likely to be such a difference between the business done by a corporation and that done by a private person that the State well may take it into account when it permits a corporation to be formed. That the provision in question is reasonable is made more probable by the fact that it had been adopted and sustained not only in Texas but in other States. *Grayburg Oil Co.* v. *Powell*, 118 Texas 354; *Lewis* v. *South Pacific Coast R. Co.*, 66 Cal. 209; *Cook* v. *W. S. Ray Manufacturing Co.*, 159 Cal. 694; *Central Georgia Power Co.* v. *Stubbs*, 141 Ga. 172; *Bagley* v. *Mississippi Valley Trust Co.*, (Mo.) 252 S. W. 84; *Morrimac Veneer Co.* v. *McCalip*, 129 Miss. 671, 683. We cannot say that it is not.

Order dismissing appeal vacated and judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.